

United States
Circuit Court of Appeals

For the Ninth Circuit.

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COLUMBIA RIVER PACKERS ASSOCIATION,
a corporation, BAKER'S BAY FISH COM-
PANY, a corporation, and H. J. BARBEY,
Appellants,

vs.

THE UNITED STATES OF AMERICA, THE
STATE OF OREGON, and THE STATE OF
WASHINGTON,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United
States for the District of Oregon.

FILED

JAN 15 1936

PAUL P. O'BRIEN,

United States
Circuit Court of Appeals

For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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R. G. SHARPE,

Assistant Attorney General of the
State of Washington,

Olympia, Washington,

for Appellee, The State of Washington.

In the District Court of the United States
for the District of Oregon

No. E 9471

UNITED STATES OF AMERICA,

Plaintiff,

vs.

COLUMBIA RIVER PACKERS ASSOCIATION,
a corporation; BAKER'S BAY FISH COM-
PANY, a corporation; and H. J. BARBEY,
Defendants.

CITATION ON APPEAL.

The President of the United States of America,

To United States of America, plaintiff, the State
of Oregon, and the State of Washington, peti-
tioners for leave to intervene, GREETING:

WHEREAS, the above named defendants Co-
lumbia River Packers Association, a corporation,

Baker's Bay Fish Company, a corporation, and H. J. Barbey, have appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the decree rendered and entered in the District Court of the United States for the District of Oregon, on the 9th day of August, 1935, in favor of the said plaintiff, United States of America, and against the said defendants, and have given the security as required by law, therefore

You, and each of you, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the court room thereof, in the City of San Francisco, State of California, within [1*] thirty (30) days from the date hereof, to show cause, if any there be, why the Findings and Conclusions of said District Court in said cause and said Decree should not be reversed and corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, Oregon, in said District of Oregon, this 1st day of November, 1935.

CHARLES C. CAVANAH

Judge of the United States District
Court for the District of Oregon,
presiding in the above cause. [2]

Due and timely service of the attached Citation on appeal of defendants by receipt of a true copy

*Page numbering appearing at the foot of page of original certified Transcript of Record.

thereof, acknowledged this 3d day of November, 1935.

G. W. HAMILTON

Attorney General of the
State of Washington

R. G. SHARPE

Assistant Attorney General of the
State of Washington

Attorneys for the State of Washington.

State of Oregon,
County of Multnomah,
District of Oregon.—ss.

Due and timely service of the foregoing Citation on Appeal, together with receipt of a copy thereof, duly certified as such by A. E. Clark, one of the attorneys for defendants-appellants, is hereby admitted at Portland, Oregon this 3rd day of November, 1935.

I. H. VAN WINKLE

Attorney General of the State of Oregon.

RALPH E. MOODY

Attorney for the State of Oregon.

District of Oregon,
State of Oregon,
County of Multnomah.—ss.

Due service of the within Citation on Appeal is hereby accepted in Multnomah County, Oregon, this 3rd day of November, 1935, by receiving a copy

thereof, duly certified to as such by A. E. Clark of Attorneys for Defendants.

EDWIN D. HICKS

Of Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 2, 1935. [3]

In the District Court of the United States for the District of Oregon.

March Term, 1935.

BE IT REMEMBERED, That on the 10th day of June, 1935, there was duly filed in the District Court of the United States for the District of Oregon, a SECOND AMENDED BILL OF COMPLAINT, in words and figures as follows, to wit:

[4]

[Title of Court and Cause.]

SECOND AMENDED BILL OF COMPLAINT

COMES NOW the United States of America, by Carl C. Donagh, United States Attorney for the District of Oregon, and Edwin D. Hicks, Assistant United States Attorney, under direction of the Attorney General of the United States, and, after leave of court having been duly had and obtained, files this, its Second Amended Bill of Complaint, and for its cause of suit against the above-named defendant alleges:

I.

That on the 21st day of October, 1864, the Legislative Assembly of the State of Oregon passed an Act entitled:

“AN ACT to grant to the United States all right and interest of the State of Oregon to certain tide lands herein mentioned.

“Section I. There is hereby granted to the United States, all right and interest of the State of Oregon, in and to the land in front of Fort Stevens, and Point Adams, situate in this state, and subject to overflow, between high and low tide, and also to Sand Island, situate at the mouth of the Columbia River in this State; the said island being subject to overflow between high and low tide.”

That ever since the passage of said Act, plaintiff has been in possession of said Sand Island and has so possessed the same as a military reservation of the United States and is now the exclusive owner thereof and entitled to the immediate and exclusive possession thereof. [5]

II.

That during all the times herein mentioned said Sand Island was located within the estuary of the Columbia River, United States of America, within Clatsop County, State of Oregon, and within the jurisdiction of this Court.

III.

That the said tract of land called “Sand Island” is located and described upon a certain official map and chart prepared by the War Department of the United States for the year 1933, which said official

map and chart of said Sand Island, showing the location thereof in the said Columbia River and within the State of Oregon, and also showing the location of the said main north channel of the Columbia River, is attached to the original bill of complaint filed herein, marked Exhibit "A", and the same is by reference made a part of this second amended complaint, which said Exhibit "A" shows the location of said Sand Island to be east and south of the said north ship channel of the Columbia River.

IV.

That the waters of the Columbia River adjacent to Sand Island and are frequented by salmon, and the beach or spit on the west and southwest end of Sand Island is peculiarly adapted to the drawing of seines and floating fishing gear, and said waters are immensely valuable for the purpose of seining for salmon.

V.

That during all the times herein mentioned the defendant, Columbia River Packers Association, was and now is a corporation, organized under the laws of the State of Oregon and engaged in the business of fishing for salmon and owning and operating canneries, and the defendant, Baker's Bay Fish Company, is a subsidiary corporation of said defendant, Columbia River Packers Association, and all of the capital stock thereof is owned and/or controlled by said defendant, Columbia [6] River Packers Association, so that the said Baker's Bay

Fish Company is the corporate agent of said Columbia River Packers Association.

VI.

That during all the times herein mentioned the defendant, Baker's Bay Fish Company, was and now is a corporation organized under the laws of the State of Washington, engaged in the business of fishing in the waters of the Columbia River hereinafter described.

VII.

That on or about the 1st day of May, 1930, the defendants, H. J. Barbey and the Columbia River Packers Association, a corporation, leased from plaintiff, for seining purposes only, for a period of five years, the land on the south side of Sand Island, which is described as Sites No. 1, 2, 3, 4, and 5 in said lease, and which is well known to all of the defendants herein, and which is more particularly described and mapped in that certain cause of *Strandholm v. Barbey*, 144 Or. 705, 26 P. (2d) at page 48, to which reference is hereby made, and the same is hereby incorporated herein by this reference the same as if said descriptions were fully impleaded herein.

VIII.

That defendants, after having occupied said Sand Island under the terms of said lease for two successive seasons, to-wit: for the years 1930 and 1931, thereupon secured a cancellation of said lease and

abandoned said premises; that beginning in 1932, and through the years 1933 and 1934, the said defendants have continued to use the properties hereinabove described without paying plaintiff any rental therefor, and, if not restrained by this court, will occupy said premises during the fishing season of 1935; that preparations for the fishing of said premises for the season of 1935 have been made and said defendants, and each of them, have threatened and do now threaten to enter upon said Island and appropriate said premises for the uses of fishing and to the irreparable injury and damage of plaintiff. [7]

IX.

That the defendants, H. J. Barbey and Columbia River Packers Association and Baker's Bay Fish Company, operate four fish seines, each being over 1250 feet in length, over said premises belonging to plaintiff, and take from plaintiff's said premises immense quantities of salmon, and drag said seines upon the beaches; i. e., the land between high and low tides, of said Sand Island, for the purpose of taking fish; that in connection with the said seining operations of said defendants, the said defendants keep on said Sand Island twenty-six or more horses and stable said horses in buildings constructed by defendants on the mainland of said Island.

X.

That defendants have no right, title or interest in and to said premises, and should be restrained by

order of this court from fishing said premises and occupying said premises.

XI.

That plaintiff has no plain, speedy or adequate remedy at law.

WHEREFORE, Plaintiff prays a decree of court as follows:

1. For an order of the Court, directing the defendant, Columbia River Packers Association, a corporation; Baker's Bay Fish Company, a corporation; and H. J. Barbey, to appear at a time fixed by this Court and show cause why the said defendants should not be enjoined and restrained from trespassing upon the said premises set forth in the complaint herein, and from seining said premises and the landing of fish thereon and using said premises for horses and men and carrying on said fishing and seining operations;

2. That upon hearing of this cause the Court decree that defendants herein, and each of them, have no right, title or interest in and to those certain premises lying in the Columbia River, south and west of Sand Island, or south and east of the main north ship channel [8] of the Columbia River, as shown by the government map for the year 1933, and that the plaintiff is the owner and entitled to the immediate and exclusive possession thereof, and that the court render a further decree restraining and enjoining the said defendants, and each of them, from using said premises in the manner aforesaid, or at all;

3. That plaintiff recover of and from defendants its costs and disbursements incurred herein.

CARL C. DONAUGH

United States Attorney for the
District of Oregon.

EDWIN D. HICKS

Assistant United States Attorney.

State of Oregon,
County of Multnomah—ss.

I, Edwin D. Hicks, being first duly sworn, depose and say: That I am duly appointed, qualified and acting Assistant United States Attorney for the District of Oregon; that I have read the foregoing Second Amended Complaint and know the contents thereof, and that the same is true according to my best knowledge and belief.

EDWIN D. HICKS.

Subscribed and sworn to before me this 8th day of June, 1935.

[Seal] HUGH L. BIGGS

Notary Public for Oregon. My commission expires: 9/17/35.

United States of America,
District of Oregon—ss.

Service of the within Second Amended Bill of Complaint is accepted in the State and District of Oregon this 8th day of June, 1935, by receiving a copy thereof, duly certified to as such by Edwin D.

Hicks, Assistant United States Attorney for the District of Oregon.

JAY BOWERMAN

Attorney for Columbia River
Packers Assn., and Baker's
Bay Fish Company.

CLARK & CLARK

Attorney for H. J. Barbey.

[Endorsed]: Filed June 10, 1935. [9]

AND AFTERWARDS, to wit, on Monday, the 10th day of June, 1935, the same being the 79th Judicial day of the Regular March Term of said Court; present the Honorable John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [10]

[Title of Court and Cause.]

Now at this day upon motion of Mr. Edwin D. Hicks, Assistant United States Attorney,

IT IS ORDERED that he be and is hereby permitted to file a second amended complaint herein, and

IT IS ORDERED that the answer heretofore filed to the amended complaint stand as the answer to the second amended complaint herein. [11]

AND, to wit, on the 9th day of October, 1934, there was duly filed in said Court, an Answer to Amended Bill of Complaint, in words and figures as follows, to wit: [12]

[Title of Court and Cause.]

ANSWER TO AMENDED COMPLAINT.

Now comes the defendants and, for answer to the amended complaint of the plaintiff herein,

I.

Admit that, on the 21st day of October, 1864, the Legislative Assembly passed an Act entitled as in Paragraph I of the amended complaint alleged, and that ever since the passage of said Act the United States has been the owner of the rights and properties therein granted. In this connection the defendants aver that, in the main, Sand Island, referred to in said Act, is and always has been vacant and unoccupied and no use thereof made by the plaintiff, except that parts have from time to time been leased for use in connection with fishing operations.

II.

Admit that Sand Island is located in the lower waters of the Columbia river in Clatsop County, Oregon.

III.

Admit that a map attached to the original complaint (but not to the amended complaint) and marked Exhibit A, purports to show the location

of Sand Island. Deny that said map [13] properly, or at all, shows the location of the main, middle or north ship channel of the Columbia river, either as it existed when Oregon was admitted to the Union or as it exists at the present time. In this connection, the defendants allege that extending south and southeasterly from Cape Disappointment is a body of land commonly referred to as Peacock Spit; that said Peacock Spit extends to a point west and south of Sand Island, is not a part thereof but is now, and for many years last past was, a body of land having no connection with and constituting no part of Sand Island. In this connection, these defendants further allege that the boundaries of the State of Oregon were fixed by Act of Congress approved February 14, 1859 (11 St. L., ch. 33, p. 383; Vol. I, p. 32, Oregon Code 1930) which, so far as material here, reads as follows:

“Beginning one marine league at sea, due west from the point where the forty-second parallel of north latitude intersects the same; thence northerly, at the same distance from the line of the coast lying west and opposite the state, including all islands within the jurisdiction of the United States, to a point due west and opposite the middle of the north ship-channel of the Columbia river; thence easterly, to and up the middle channel of said river, and, where it is divided by islands, up the middle of the widest channel thereof, to a point near Fort Walla Walla.”

At the time said Act was passed, the north ship-channel referred to therein was south and east of Cape Disappointment and west and north of Sand Island. In the case of *State of Washington vs. State of Oregon*, wherein it was determined that Sand Island was within Oregon and that the north ship-channel referred to in the Act admitting Oregon into the Union passed north of Sand Island, the physical conditions existing in the lower waters of the Columbia River at the time of the admission [14] of Oregon into the Union were discussed and there is made a part of the opinion of the court a chart or map of Sand Island, Baker's Bay, Cape Disappointment, Peacock Spit and the shoals and channels in the lower Columbia as shown by survey made by the United States Government and published in 1851 and there is also made a part of the said opinion another map or chart showing the changes in the contour and location of Sand Island at different times between 1851 and 1905. (211 U. S. 127, 53 L. Ed. 118; 214 U. S. 205, 53 L. Ed. 969). The northerly boundary of Oregon as fixed by said Act and in said decision of the supreme court of the United States is the southerly boundary of the State of Washington.

IV.

Admit that the waters of the Columbia river adjacent to some parts of Sand Island are shallow. This is particularly true of the waters to the north and east of Sand Island in the Baker's Bay area.

Prior to certain physical changes which have occurred during the past two or three years due to the construction of dikes by the government, the break in the south jetty and other causes, the south and west shore of Sand Island, as shown by the heavy white line marking the boundaries of said Island on the map attached to the original complaint herein, was adapted to drag seine fishing operations and valuable for that purpose. There never was any sand spit or sand beach constituting a part of Sand Island along the south and west shore thereof. The shore of Sand Island to the south and west was such as is ordinarily found upon firm land between high and low water mark in tidal waters.

V.

Defendants admit that defendant Columbia River Packers Association for many years last past was, and now is, a corpora- [15] tion organized under the laws of the State of Oregon and engaged, among other things, in the shing industry and that it owns and operates canneries; admit that Baker's Bay Fish Company is a corporation, that a majority of the capital stock is owned or controlled by Columbia River Packers Association. Deny that Baker's Bay Fish Company is the corporate agent of Columbia River Packers Association and aver that each of said corporations is a separate and distinct corporate entity and neither is the corporate agent of the other.

VI.

Admit that Baker's Bay Fish Company for many years last past was, and now is, a corporation organized under the laws of the State of Washington and engaged, among other things, in the fishing industry in the waters of the Columbia river and elsewhere.

VII.

Admit that, on March 27th, 1930 (not May 1st as alleged in the amended complaint) the Secretary of War, acting for and on behalf of the United States of America, leased to the defendants H. J. Barbey and Columbia River Packers Association, for a period of five years from and after May 1st, 1930, but subject to revocation at any time at the will of the Secretary of War, the right to use certain parts of the southerly and southwesterly shore line of Sand Island for seining purposes only, the premises being known as Sites Nos. 1, 2, 3, 4 and 5.

Admit that said lease and said Sites are referred to in the decision of the Supreme Court of the State of Oregon in the case of Strandholm vs. Barbey, 145 Ore. 427, 26 Pac. (2d) 46 (inaccurately cited in the amended complaint as 144 Or. 705, 26 Pac. (2d) 48).

VIII.

Admit that under said lease defendants Columbia River [16] Packers Association and H. J. Barbey used the leased premises in connection with drag seine fishing operations during a part of the fishing season of 1930 and a part of the fishing season

of 1931. Due to physical changes, fishing on the leased premises became impracticable in 1931 and the said defendants, being no longer able to fish said leased premises because of such physical changes and being substantially evicted therefrom by reason thereof, quit and abandoned said premises in August, 1931, and at no time thereafter used or occupied the same or any part thereof for fishing purposes or for any other purpose. Thereafter, and in May, 1932, the Secretary of War, acting in behalf of the United States of America, formally cancelled and terminated said lease.

Deny each and every other allegation contained in paragraph VIII of the amended complaint. In this connection, the defendants allege that what the plaintiff in truth and in fact complains of in the amended complaint and what it in terms alleged and complained of in the original complaint herein was that the defendants under what purported to be a lease of a part of Peacock Spit from the State of Washington, and which was a lease lawfully entered into, the defendants were fishing said part of Peacock Spit described in the lease from the State of Washington, the plaintiff asserting in said original complaint what in truth and in fact it seeks to assert in the amended complaint that that portion of Peacock Spit leased to the defendants as aforesaid by the State of Washington is in fact within the State of Oregon. The situs of fishing operations of which the plaintiff complains is not on Sand Island but on Peacock Spit.

In this connection, these defendants allege that for upwards of seventy (70) years there has been a body of land, commonly referred to as Peacock Spit, extending, in early years, [17] southwesterly and, in later years, southeasterly from Cape Disappointment into the waters of the Columbia River. No part of Peacock Spit was at any time, or is now, within the boundary of the State of Oregon as fixed by the Act of Congress admitting it into the Union and as determined by the decision in the case of State of Washington vs. State of Oregon, *supra*. Peacock Spit and every part thereof has been within the State of Washington ever since said State was admitted into the Union.

In May, 1928, the defendant Baker's Bay Fish Company leased from the State of Washington, for fishing purposes, certain parts of Peacock Spit being the identical area embraced within the lease which said defendant now has with the State of Washington. On or about June 4, 1931, said lease was cancelled by the State of Washington and said premises reappraised and a lease thereon was offered at public auction to the highest bidder and said premises were again leased to defendant Baker's Bay Fish Company by the State of Washington for a period ending in December, 1932. Thereafter, and on December 22, 1932, the said premises were again leased to defendant Baker's Bay Fish Company by the State of Washington. That attached hereto, marked Exhibit A and made a part of this answer is a true copy of the lease last referred to bearing

date December 22nd, 1932. That said lease is still in full force and effect. On December 28, 1932, defendant Baker's Bay Fish Company assigned and transferred unto the defendant H. J. Barbey a half interest in said lease, which transfer was consented and approved by the State of Washington on January 5th, 1933. Said lease is the identical lease referred to in paragraph IX of the original complaint herein wherein it was alleged that the defendants

“fraudulently entered into a pretended lease with the State of Washington, through its said Commissioner of Public Lands, for certain lands which were described as ‘Peacock Spit’,”.

[18]

That said premises so leased from the State of Washington are the premises upon which the defendants have been carrying on the fishing operations referred to in the original complaint and in the amended complaint and said fishing operations have been confined entirely to the premises described in said lease. The premises upon which the defendants keep horses and maintain structures, referred to in paragraph XI of the original complaint and paragraph IX of the amended complaint, are the premises described in said lease with the State of Washington.

Pursuant to the laws of the State of Washington and before either of said leases was executed by the State of Washington to the defendant Baker's Bay Fish Company, public notice was given that such lease would be executed to the highest bidder

for the fishing privileges therein to be granted, and an additional special notice in writing sent by the Commissioner of Public Lands of the State of Washington to all persons and concerns engaged in the fishing industry as packers, canners or operators of seining grounds. The subject-matter of each of said leases was sold at public auction to the highest bidder. Defendant Baker's Bay Fish Company was the highest bidder, bidding the sum of \$36,000.00 a year for fishing rights covered by the lease executed in May, 1928; \$7,500.00 a year for the lease executed in June, 1931; and \$5,000.00 a year for the lease executed in December, 1932; the decrease in the rentals being due in part to physical changes in the structure of Peacock Spit, lessening its value for fishing purposes, the economic depression, and the unsatisfactory condition of the fishing industry. It was during this same period that the plaintiff in this suit was leasing to defendants Columbia River Packers Association and H. J. Barbey certain fishing rights on Sand Island for a consideration of about \$37,000.00 a year and without any claim or pretense that the aforesaid leases for the State of Washington were upon Sand Island or in [19] anywise conflicted with the leases executed by the United States for fishing rights on Sand Island.

The premises leased by the State of Washington to defendant Baker's Bay Fish Company as aforesaid, being the identical premises upon which the defendants have carried on the fishing operations described in the original complaint and in the

amended complaint herein, are not and never were a part of Sand Island and are not and never were within the State of Oregon.

At no time since Oregon was admitted to the Union has it claimed that said premises or any part thereof were within the State of Oregon or exercised or claimed the right to exercise any jurisdiction over it.

At all times since the State of Washington was admitted into the Union, it has claimed and still claims that the premises in question and all other parts of Peacock Spit were and are within the said State and the right to exercise jurisdiction over them. Ever since the State of Washington was admitted into the Union it has exercised control and jurisdiction over said premises and all other parts of Peacock Spit for fishing purposes and other purposes and has from time to time issued licenses for fish traps and other stationary fishing appliances and gear to be maintained on said premises and has leased said premises for drag seine fishing.

Since the State of Washington was admitted to the Union many controversies have arisen with regard to fishing rights on Peacock Spit and in waters adjacent thereto, including the premises described in the lease, a copy of which is attached to this answer, being the identical premises to which the plaintiff refers in its original complaint and in its amended complaint herein. In all such controversies the courts of the State of Washington have assumed jurisdiction and adjudicated such [20] controver-

sies upon the undisputed assumption that the premises were located within the State of Washington. The case of Williams Fishing Company vs. Savidge, as Commissioner of Public Lands of the State of Washington, 152 Wn. 165, 277 Pac. 459, was a suit brought to restrain the Commissioner of Public Lands of the State of Washington from executing to Baker's Bay Fish Company, one of the defendants in this suit, the first lease executed by the State of Washington to said defendant, which lease was executed in May, 1928, and covered the identical premises, including Peacock Spit, described in the lease executed in December 22, 1932, a copy of which is attached to this answer as Exhibit A, being the identical premises upon which the defendants carried on the fishing operations described in the complaint and in the amended complaint herein and which lease additionally described lot 3, in the same section, township and range. The Supreme Court of the State of Washington assumed jurisdiction in said case, held that the Commissioner of Public Lands had authority to execute said lease and that the lease was valid. Various phases of the same controversy came before the Supreme Court of Washington in two subsequent cases in which the validity of the lease was sustained (155 Wn. 443, 284 Pac. 744; 164 Wn. 50, 2 Pac. (2d) 722).

Long prior to 1925, the United States of America solicited and obtained a legislative grant from the State of Washington for use for military purposes, when such use became convenient or necessary, of

Peacock Spit, and all other tide lands lying within one and one and one-half miles of the south point of Cape Disappointment. In March, 1925, the Attorney General of the United States rendered an opinion to the effect that Peacock Spit was not a part of a military reservation; that the use thereof had been granted by the State of Washington to the United States for military purposes so long as the adjoining shore lands were so used; that Peacock Spit was in the State of [21] Washington and that the State of Washington might legally permit fishing upon it and in the waters adjacent thereto (Op. Attorney General Vol. 34, pp. 435 and 436). The following is quoted from said opinion of the Attorney General (Vol. 2 Fed. Supp. p. 432):

“ ‘First. Peacock Spit and all other tide lands lying within one and one-half miles of the southern point of Cape Disappointment were not reserved by the order of 1852, and do not belong to the United States, although the use of such lands has been granted by the State of Washington to the United States for military purposes, so long as the adjoining shore lands are so used.

“ ‘Second. The State of Washington may legally permit fishing upon and in the vicinity of such tide lands.’ ”

The premises in controversy in this suit are a part of the premises referred to in said opinion of the Attorney General. The United States of America

has repeatedly asserted in judicial proceedings and otherwise that the premises here in controversy were located within the State of Washington. In 1930, in the District Court of the United States for the Western District of Washington, Southern Division, the United States of America, as Trustee and guardian of certain Indian tribes, brought two suits, one against defendant Baker's Bay Fish Company and others upon claim that said defendant under lease of the premises in controversy in this suit from the State of Washington was interfering with and impairing the treaty fishing rights of the Indians. (U. S., as Trustee, etc. vs. McGowan; U. S. vs. Bakers Bay Fish Company, et al; 2 Fed. Supp. 426). In each of said suits it was alleged that the premises in question were located in the State of Washington, and in the suit against Baker's Bay Fish Company, et al, it was alleged that each year from time immemorial certain Indians were accustomed to fish the waters and locations along the north shore of the Columbia River, [22]

“and among others were certain locations situated on the north bank of the Columbia River, in Pacific County, Washington, and on Peacock Spit, in Pacific County, Washington, opposite to and adjoining the Fort Canby Military Reservation, and being in Township Nine (9), North of Range Eleven (11), West of Willamette Meridian.”

It was further alleged in said complaint by the United States of America that the Indians had and

claimed to have the right to fish in certain particular locations described as follows:

“ ‘Those certain tidelands situated in front of, adjacent to, or abutting upon Lots three (3) and four (4), Section nine (9), Township nine (9) north, of Range Eleven (11), West of the Willamette Meridian, including Peacock Spit, as shown upon the map of the mouth of the Columbia River prepared by the United States Engineer's Office, Second Portland, Oregon, District of May, 1928.’ ”

Lot Four (4) above described is the identical parcel of land described in the lease of the State of Washington to defendant Baker's Bay Fish Company, a copy of which is attached to this answer, and is the identical premises described in the prior leases which said defendant had from the State of Washington. In said suits the State of Washington intervened and Judge Cushman assumed jurisdiction on the assumption that the premises were in the State of Washington and held that the Indians had not established any treaty rights as against the State of Washington or its lessee, Baker's Bay Fish Company. The decision of Judge Cushman was affirmed by the Circuit Court of Appeals (62 Fed. (2d) 955), and by the Supreme Court of the United States (Adv. Sh. No. 1. p. 87, Vol. 78 L. Ed. Oct. 23, 1933).

In this connection the defendants further allege that the shallow channel cutting across Peacock Spit in a southwesterly and northeasterly direction

southerly of Cape Disappointment is not and never was a natural channel. It was caused in this manner: four or five years ago the "North Bend", a large sailing vessel, went [23] ashore on Peacock Spit at about where the southwesterly terminus of said channel is now located. It did not break up but, through the action of the winds, waves and tides, was slowly driven, during a period of a year or more, across Peacock Spit into the channel then existing between it and Sand Island and through the channel so cut water has continued to run with the ebb and flow of the tides since that time.

These defendants in this connection further allege that this suit involves a determination of the boundary line between the State of Oregon and the State of Washington; that said States are indispensable parties to this suit and this court has no jurisdiction over this suit.

That this suit involves the determination of the title to land which the State of Washington claims to own and the right to lease and the State of Washington is an indispensable party. That the lands and premises involved in this suit are not located within the State of Oregon but are located within the State of Washington, and are beyond the jurisdiction of this court.

IX.

The defendants admit that they operate drag seines about 1250 feet in length, over and upon the premises leased from the State of Washington, pursuant to the lease, a copy of which is attached to

this answer as Exhibit A, and during the fishing season of 1934 took considerable quantities of salmon from the waters adjacent to said leased premises through the use of said drag seines. Defendants also admit that they have built and maintained structures and keep some horses on the said leased premises.

Deny that the said premises belong to the plaintiff or that they are within the State of Oregon or that the defendants or either of them carry on any fishing operations on any property [24] belonging to the plaintiff or maintain any structures or keep any horses upon properties belonging to the plaintiff.

X.

Deny the allegations contained in paragraph X of the amended complaint.

XI.

Deny the allegations contained in paragraph XI of the amended complaint.

WHEREFORE defendants pray that this suit be dismissed; that they may recover their costs and disbursements, and have such further relief as may be just in the premises.

A. E. CLARK,

M. H. CLARK,

JAY BOWERMAN,

GUY KELLY,

Attorneys for Defendants. [25]

State of Oregon,
County of Clatsop.—ss.

I, H. J. Barbey, being first duly sworn, depose and say that I am one of the defendants in the above entitled cause; and that the foregoing answer is true as I verily believe.

H. J. BARBEY

Subscribed and sworn to before me this 8th day of October, 1934.

[Seal]

W. T. EAKIN

Notary Public for Oregon.

My commission expires Jany. 11, 1936. [26]

EXHIBIT "A"

THIS LEASE, made and entered into this 22nd day of December, A. D. 1932, by and between the State of Washington, party of the first part, and Bakers Bay Fish Company, Ilwaco, Washington, party of the second part,

WITNESSETH that for and in consideration of the sum of Five thousand and no/100 (\$5,000.00) Dollars per year, to be paid to the Commissioner of Public Lands of the State of Washington yearly in advance, and in consideration of the covenants hereinafter contained, the State of Washington doth lease, demise and let unto the party of the second part that tract or parcel of tide land of the second class, situate in Pacific County, State of Washington, and described as follows, to wit:

That portion of the tide lands of the second class, owned by the State of Washington, situate in front of, adjacent to or abutting upon the southerly side of lot 4, section 9, township 9

north, range 11 west, W.M., including Peacock Spit, lying southeasterly of the Main Channel Range, as shown upon the United States Coast and Geodetic Survey Chart No. 6151 of the Columbia River.

This lease is issued under the provisions of section 126 of chapter 255 of the Session Laws of 1927, and is subject to the grant of the above described tract to the United States, under the provisions of section 150 of said chapter 255, for the period of five (5) years from the date of this instrument.

As a further consideration the following covenants are mutually agreed to:

The payment of the above mentioned annual rent to the Commissioner of Public Lands of the State of Washington yearly in advance is of the essence of this contract, and the same shall be, and is, a condition precedent to the execution and continuance of this lease or any rights thereunder, and if said annual rent shall not be paid on or before the date when due, this lease shall be null and void.

The State of Washington reserves the right to approve any assignment of the whole or any interest in and to the within leasehold.

The tide lands herein shall not be offered for sale except upon application of lessee, who shall have preference right to release at highest rate bid: provided, however, and these rights are conditioned that lessee shall keep his lease in good standing.

All improvements placed upon said land by the lessee, capable of removal without damage to the land, where the lease is yielded to the state prior

to any application to purchase said land, may be removed by the lessee, or at his option may remain on the land subject to purchase or hire, and this lease is granted according to the provision of an act relating to lease, etc., of state lands, approved March 16, 1897 (as amended by section 2 of an act approved March 13, 1899, and acts amendatory thereof and supplemental thereto.) [27]

All piling or other improvements placed upon the above described tide lands shall attach to and become a part of the realty unless moved or sold under the provision of the said act relating to lease, etc. of state lands, approved March 16, 1897, and acts amendatory thereof and supplemental thereto within three years after termination by surrender or limitation of lease or re-lease.

No statutory right vested in lessee is waived hereby, and lessee expressly agrees to all covenants herein and binds himself or themselves for the payment of rent as hereinbefore set out.

THE STATE OF WASHINGTON
C. V. SAVIDGE,

Commisisoner of Public Lands

By: W. M. DUNCAN,

Assistant Commissioner of Public Lands

BAKERS BAY FISH COMPANY

By W. L. THOMPSON,

Pres.

Lessee

P. O. Address c/o Barbey Packing Co.

P. O. Box 449 Astoria,

State of Oregon.

Witnesses as to Lessee

A. H. Whittle

Geo. Perkin

District of Oregon,
State of Oregon,
County of Multnomah.—ss.

Due service of the within ANSWER TO AMENDED COMPLAINT is hereby accepted in Multnomah County, Oregon, this 9th day of October, 1934, by receiving a copy thereof, duly certified to as such by M. H. Clark, of attorneys for defendants.

EDWIN D. HICKS,

of Attorneys for Plaintiff.

[Endorsed]: Filed October 9, 1934. [28]

AND AFTERWARDS, to wit, on the 8th day of July, 1935, there was duly filed in said Court, an OPINION OF THE COURT in words and figures as follows, to wit: [29]

[Title of Court and Cause.]

OPINION

Carl C. Donough, United States District Attorney
Edwin D. Hicks, Assistant United States District
Attorney
Portland, Oregon,
Attorneys for Plaintiff.

Clark & Clark, Portland, Oregon
Jay Bowerman, Portland, Oregon
Attorneys for the Defendants.

CAVANAUGH, District Judge.

The suit is in equity brought by the United States claiming ownership and exclusive possession of the

premises lying in the Columbia River south and west of Sand Island and south and east of the main North Ship-Channel of the River and that the defendants be enjoined from using the same in carrying on fishing and seining operations.

The principal issue raised by the pleadings and presented by the evidence is whether the lands in dispute are accretions to Sand Island and located in the State of Oregon, and if so do they belong to the United States, and if not so located, are they a part of Peacock Spit situated in the State of Washington extending southeast from Cape Disappointment into the waters of the River and beyond the jurisdiction of this Court and are held under a lease from the State of Washington by the defendants Baker's Bay Fish Company and H. J. Barbey?

It first becomes necessary to locate the boundary line between the two states which was fixed by an Act of [30] Congress on February 14, 1859, fixing the boundary of the State of Oregon, 11 Stat. L. Ch. 33, page 385, and at the time the Act was passed the North Ship-Channel was south and east of Cape Disappointment and west and north of Sand Island. It was definitely located by the Supreme Court in an action brought by the State of Washington against the State of Oregon. *Washington vs. Oregon*, 211 U. S. 127, rehearing 214 U. S. 205, and it was there determined that Sand Island was within the state of Oregon and that the center of the North Ship-Channel referred to in the Act Admitting Oregon into the Union passed north of Sand Island and

was changed only as may be from time to time through the process of accretions. The physical conditions existing in the lower waters of the Columbia River at the time of the admission of the state of Oregon were discussed in the opinion of the Court and as a part of it a map or chart, the same now before us, appears showing the location of Sand Island, Cape Disappointment, Peacock Spit, Baker's Bay and the channel and shoals of the River in 1851 and the changes in the contour and location of Sand Island at different times between 1851 and 1905. The northerly boundary line of the state of Oregon as fixed by the decision is the southerly boundary line of the state of Washington.

When we come to locate the boundary line between the two states fixed by the Supreme Court as being the center of the north ship-channel which was south and east of Cape Disappointment and west and north of Sand Island, our problem is in locating the channel south and east of Cape Disappointment and west of Sand Island as a solution of that issue of fact becomes necessary in determining the boundary line between the two states in the area where the disputed premises are located. The channel west of Sand Island lies between it and [31] Peacock Spit, and the sands abutting Sand Island and Peacock Spit have at times shifted. It appears that during the Civil War, President Lincoln withdrew from entry Sand Island for Military purposes and at the request of the then Commander of the Columbia River District the legislative assembly of

the State of Oregon on October 21, 1864, by an Act ceded to the United States, Sand Island and whatever rights the State had to the lands, between high and low water, abutting on the Island, and which was an unqualified grant of the fee. Sp. Laws Ore. 1864, p. 72. Columbia River Packers Association et al., vs. United States et al., 29 Fed. (2nd) 91. Ever since then the United States has asserted title and right to the Island and the abutting sands and has from 1880 to and including 1932 leased the fishing sites situated along the southerly and westerly shores of the Island for the purposes of drag seining operations receiving therefor large sums as rentals, some of which from the defendants, without being challenged. The channel as located by the Supreme Court, which we must adopt has shifted some from time to time from the east to the west which was caused by the shifting of sands when there were abnormal tides, but the channel, northerly, westerly and southerly of the Island still remains. The difficult problem to be solved is whether the accretions have been from Sand Island to Peacock Spit and whether the growth has been from the east to the west or from the west to the east, covering the fishing sites in controversy. They must be between high and low water and south and west of and accretions to San Island and owned by the United States before it should prevail. The evidence is conflicting in that respect when we come to consider the physical conditions and the changes in

the contour and location of Sand Island and Peacock Spit and the shifting of the channel and the sands. A number of maps prepared by the [32] Government over a series of years commencing with the year 1839, and by others are in evidence and have been explained by engineers and others as to the changes having taken place from year to year and from it all we find a conflict in their versions and observations as to whether the disputed fishing sites are accretions to Sand Island or Peacock Spit. There has been a gradual shifting and growing of both the Island and Peacock Spit caused by frequent storms, high water tides and breakers which have at times broken up the shores of the Island and the sands lying in that vicinity. The tides, waves and currents have direct access from the bar at the mouth of the River to the Island. They move the sands of the Island and Peacock Spit around and wash them in and out. During high water tides, sands lying south of Cape Disappointment and west of the channel between Cape Disappointment and the Island and the sands south of the Island and east of the channel separating the Island and Cape Disappointment have been covered with water. The earliest date that Peacock Spit appears is in 1880, which is a body of land and sands extending south and southeast from Cape Disappointment. During the winter of 1928 and 1929 the sands of Peacock Spit were to some extent, by reason of a storm and high tides, torn apart and dissipated.

As to Sand Island, it has been in existence for a long time, and the sands abutting thereon have shifted some westerly and increased in area which was due to accretions. Adjoining it on the north are the waters of Baker's Bay and to the south is the main channel of the river. The Island itself is admitted to be within the State of Oregon but not the disputed fishing sites which defendants contend are accretions of Peacock Spit and are therefore covered by and used by them under their lease from the State of Washington. This is the crucial issue of fact in this case, and calls for a conclusion [33] as to whether the accretions, where the disputed fishing sites are located have been from Sand Island or from Peacock Spit for the increase in area gives to the owner of the land on which accretions abuts all the accretions thereto, and the title to the accretions extend to the point where the two bodies of land may unite.

The defendants J. H. Barbey and the Columbia River Packing Association, on March 27, 1930, executed a lease with the Secretary of War for five years commencing May 1, 1930 which was subject to revocation at will by the Secretary, of the lands on the south side of Sand Island in Oregon, described as "all of that certain premises of the south shore of Sand Island, together with rights, easements and appurtenances thereunto belonging, known as sites nos. 1, 2, 3, 4 and 5, the northernmost boundary being marked by line running due west from U. S. Monument no. 4 to the intersection with

low water line; the easterly boundary is marked by line running due south through Station "Island" to low water near the east end of Sand Island, length of shore line approximately 18,000 feet, all as shown and described on the attached map which is made a part hereof", and the map attached to the lease located the sites as being on the south shore of Sand Island, and at a rental of \$37,175.00 annually, and after occupying the sites under the lease for 1930 and 1931 they secured a cancellation of it and abandoned the premises beginning with 1932. Thereafter during the years of 1933 and 1934 they again used the premises described in the lease without paying the United States any rental therefor. On May 7, 1928, the defendant Baker's Bay Fish Company executed a lease with the State of Washington for an annual rental of \$36,000.00 and for a period of five years to "that portion of the tide lands of the second class, owned by the State of Washington, situate in front of, adjacent to or abutting upon the southerly side of lot 4, Section 9, [34] township 9 north range 11 west, W. M., including Peacock Spit, lying southeasterly of the Main Channel Range, as shown upon the United States Coast and Geodetic Survey Chart No. 6151 of the Columbia River". The last mentioned lease was renewed on December 22, 1932, covering the same lands for an annual rental of \$5000.00 for a period of five years, and under it the defendants assert a right to occupy the sites for seining operations. After the defendants' answer was filed the

state of Washington enacted a law prohibiting the use of drag seines in that state which seemed to have caused the defendants to appear before the State Land Board of the state of Oregon and urge the Board to lease the premises. From their actions they seemed to be somewhat in doubt as to just where these disputed sites are located for they were content in accepting, first, a lease from the United States stating that they were in the state of Oregon and owned by the United States, second, that in their lease with the state of Washington the sites were located in that state and third, that they are now interested in the action of the State Land Board of Oregon in leasing them as being in the state of Oregon. But however inconsistent the position of the defendants may be in that respect, the conclusion is reached under the evidence that the disputed fishing sites as described in the complaint are accretions to Sand Island and they and the adjacent tide and shore lands up to high water line are located within the state of Oregon and are owned by the United States under the unqualified grant from the state of Oregon, after further considering the north ship-channel as an active one and has maintained approximately the same general course since 1880. The movement peculiar to Sand Island and sand bodies which are predisposed to form in the estuary of the Columbia are recognized in the decision of the Supreme Court and the rules for location of the line of the channel [35] were prescribed by the Court; (1) the line may be lo-

cated by tracing the thread of the channel as the same may have from year to year varied through process of accretion and (2) as the same has varied by reason of changes shaped through the construction of jetties out into the river. This is significant when we consider the language used by the Court: "So whatever changes have come in the north channel and although the volume of water and the depth of that channel have been constantly diminishing, yet, as all resulted from processes of accretion, or, perhaps, also of late years from the jetties constructed by Congress at the mouth of the river, the boundary is still that channel, the precise line of separation being the varying center of that channel. *Washington vs. Oregon*, on rehearing, 214 U. S. 205-215. So the variation in the line of the channel may be accounted for by accretions or shaped through the construction of jetties out into the river and when so done we must follow the line as so changed by accretions or shaped through the construction of the jetties. The evidence would not justify the conclusion that the change in the channel's course during the years it occurred was avulsion or from the fact that the sands of Peacock Spit, in the winter of 1928 and 1929 were torn apart and set afloat in the estuary of the Columbia River, or under the assumed legal status of tide lands or tide flats, nor would that fact and because some of them united later on with the sands of Sand Island, take away from Sand Island and sands which are accretions of it

in the area where the disputed fishing sites are located. Therefore, this Court has jurisdiction to determine the subject matter of the controversy as between the present parties, the defendants being resident citizens of Oregon.

In the case of Columbia River Packers Association Inc., et al. vs. United States et al., supra, where the United [36] States and its lessee brought suit against the State Land Board of the state of Oregon and its lessee, to establish the right and title of the United States to Sand Island, and to the tide and shore lands adjacent thereto, the Ninth Circuit Court of Appeals after reviewing the history of the Island stated that the Island was within the limits of the state of Oregon and that by the Order of the President it was set apart for military purposes on April 21, 1863, and on October 24, 1864 the state of Oregon by an Act granted to the United States "all the right and interest of the state of Oregon in and to the land in front of Ft. Stevens and Point Adams, situate in this state, and subject to overflow between high and low tide; also to Sand Island, situate at the mouth of Columbia River in this state; the said Island being subject to over-flow between high and low tide", and that although the Island was never used for military purposes yet Congress passed an Act on July 28, 1892 authorizing the Secretary of War to lease the premises for a period of five years and that pursuant to such authority the Secretary had leased the Island and the adjacent tide and shore

land for fishing purposes since 1903 and from such leasing there had been paid to the United States upwards of \$400,000.00 as rentals. The court said "After the lapse of nearly 70 years it would seem that a grant such as was made by the state of Oregon in this case should not be open to further controversy, especially in view of the fact that the grantee has asserted and exercised dominion over the granted premises for upwards of 25 years. Nevertheless, the state of Oregon now contends, first, that the grant was for military or naval purposes only, and, second, that the grant has never been accepted by Congress. But the grant itself is absolute in form, without limitation or condition, and it would violate every known rule of statutory construction to ingraft upon it now any such limitation [37] or condition as that contended for by the appellees, especially in view of the construction the parties themselves have placed upon the grant for so long a period. Furthermore long acquiescence by the state in the assertion of title and the exercise of dominion over the property by the United States should be deemed conclusive at this late day. *Indiana vs. Kentucky*, 136 U. S. 479, 10 S. Ct. 1051, 34 L. Ed. 329."

While the laws of Oregon provide that tide lands over which the tide ebbs and flows from the line of the high tide to the low tide belong to the state, section 60-301 Oregon Code 1930, yet we observe that the Court of Appeals interprets the grant from the state of Oregon to the United States as con-

veying all of the interest of the state in and to the lands between high and low tide and that by virtue of the absolute grant from Oregon, which was without limitation or condition, the United States acquired title and right to the lands between high and low water mark of the River and by reason of that decision holds the full riparian rights with respect to the southerly and westerly shores of the river.

Attention has been called by the defendants to the case of *United States vs. McGowan et al.*, 2 Fed. Supp. 426, which was affirmed by the Circuit Court of Appeals, 62 Fed. (2nd) 955, relating solely to Peacock Spit located in the State of Washington as it then existed in 1928, and succeeding years. The suit was brought by the United States as Guardian of certain Indians alleging that their fishing rights under a treaty had been interfered with by the defendants who claimed to have leased from the state of Washington, Peacock Spit, and which was at the time of leasing the sole and exclusive property of the state of Washington. Neither the opinion or the evidence recited in it relate, in any way, or effect the area in which the fishing sites are, involved in the present case, and there- [38] fore it does not determine the ownership or location of the disputed fishing sites we are now dealing with.

The further question of jurisdiction is urged by the defendants that as the states of Oregon and Washington claim an interest in the premises they are necessary parties to the present suit and being

so that would divest the Court of jurisdiction. On the eve of the trial these two states requested permission to intervene under equity rule 37, which was denied. Had the Court permitted these states to intervene it would have been "in subordination to and in recognition of the propriety of the main proceedings", which intervenors must accept. Equity Rule 37. *Adler vs. Seaman et al.*, 266 Fed. 828; *Jennings vs. Smith et al.*, 242 Fed. 561-564; and would not have divested the Court of jurisdiction, *In re Veach*, 4 Fed. (2nd) 334, as the intervenor could not challenge the jurisdiction of the Court; *Wichita Railroad & Light Company vs. Public Utilities Commission of the State of Kansas et al.*, 260 U. S. 48-54; *King vs. Barr*, 262 Fed. 56-59; *Adler vs. Seaman*, *supra*; *Mueller et al. vs. Adler et al.*, 292 Fed. 138. The presence of the two states is not essential to a decision of the controversy between plaintiffs and defendants for the merits of the cause can be determined without directly affecting the rights of the states or be binding upon them, *Hurley vs. Pusey & Jones Co.*, 274 Fed. 487-488, and the Court will not lose jurisdiction under such circumstances, *Wichita Railroad & Light Company vs. Public Utilities Commission of the State of Kansas*, *supra*. The same question was commented upon by the Court in the case of *United States vs. McGowan*, *supra*, where the statute granting exclusive jurisdiction of all controversies of a civil nature where a state is a party was referred to, and the Court there held that in a case between the United States

and individual and corporate citizens did not come within the exceptions. No affirmative relief was asked for in the case [39] by the United States against the state of Washington, nor is any asked for here against either the State of Oregon or Washington. The Court said "This Court may consider the rights and powers of the state in determining issues asserted by the United States against the individual and corporate defendants, claiming rights acquired from the state, although it may not undertake to determine and enforce such rights against the state itself or its officers." The case was appealed to the Circuit Court of Appeals and while the question of jurisdiction was not discussed in the opinion yet both the trial and appellate Courts assumed jurisdiction, *United States vs. McGowan*, *supra*. If these two states claim ownership of the premises adverse to one another they can bring a proper action in the Supreme Court who would have original jurisdiction under the constitution and Federal Statute; Article 3 Section 2 Constitution, Section 341, Title 28, U. S. C. A. as we find that the Supreme Court has exclusive jurisdiction of all controversies of a civil nature where the state is a party, *Minnesota vs. Hitchcock*, 185 U. S. 373. Of course, the determination of the question here involved by the Court as between the present parties would in no way affect or be binding upon the rights of these two states as they are not parties to the present action. After considering these principles applicable to the application to intervene and

the contention of the defendants under the circumstances disclosed by the record, the Court is of the opinion that it did not abuse its discretion in denying intervention which the Courts hold it has in denying intervention or requiring the bringing in of the states, *Acme White Lead & Color Works vs. Republic Motor Truck Co., Inc.*, 284 Fed. 580; *Equitable Trust Co., of New York vs. Connecticut Brass & Mfg. Corporation et al.*, 290 Fed. 712.

In view of the reasons thus expressed and the conclusion reached, the relief prayed for by the plaintiff is [40] granted and the defendants are perpetually enjoined from further occupying or using for seining operations, the disputed fishing sites described in the complaint, and with plaintiff's costs. Findings and decree may be prepared in accordance with the conclusions reached.

[Endorsed]: Filed July 8, 1935. [41]

AND AFTERWARDS, to wit, on the 9th day of August, 1935, there was duly filed and entered upon the record in said Court, FINDINGS OF FACT AND CONCLUSIONS OF LAW, in words and figures as follows, to wit: [42]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW.

The above-entitled cause came on regularly for trial in the above-entitled Court, Honorable Charles

C. Cavanah, Judge of said Court, presiding, on the 11th day of June, 1935, the plaintiff, United States of America, appearing and being represented by Edwin D. Hicks, Assistant United States Attorney for the District of Oregon, and defendants, Columbia River Packers Association, a corporation; Baker's Bay Fish Company, a corporation, and H. J. Barbey, appearing and being represented by A. E. Clark and Jay Bowerman, whereupon evidence, both oral and documentary, on behalf of the several parties was offered and received, the Court, having duly considered the evidence and arguments of counsel and being fully advised in the premises, now finds the following:

FINDING OF FACT NO. 1

That on the 21st day of October, 1864, the Legislative Assembly of the State of Oregon passed an Act entitled:

“An Act to grant to the United States all right and interest of the State of Oregon to certain tide lands herein mentioned:”

That Section 1 of said Act provided as follows:

“Section 1. There is hereby granted to the United States, all right and interest of the State of Oregon, in and to the land in front of Fort Stevens, and Point Adams, situate in this state, and subject to overflow, between high and low tides, and also to Sand Island, situate at the mouth of the Columbia [43] River in this state; the said island being subject to overflow between high and low tide.”

That the said Sand Island has been for many years last past, and now is, located in the estuary of the Columbia River, near the mouth of said River, within the United States of America and within Clatsop County, State of Oregon, and within the jurisdiction of this Court. For a more complete and detailed description of said Island and its appurtenances reference is made to the map and chart hereto attached, marked Exhibit "A" and made a part hereof, and which shows the approximate location, with the sands abutting from the southerly shores thereof.

For many years last past, save for the occupation of said premises under leases and licenses executed by plaintiff from time to time and save for the encroachment of the defendants as to the years 1933 and 1934 as hereinafter recited, plaintiff has held exclusive possession of Sand Island as holder of the unqualified fee and has so possessed the same as a military reservation of the United States, and said plaintiff is now the exclusive holder thereof and entitled to the exclusive possession thereof.

FINDING OF FACT NO. 2

The North Ship Channel of the Columbia River is an existent channel which takes a course westerly and northerly of Sand Island through Baker Bay and proceeds thence southerly into the main or South Channel of the Columbia River between the eastern shore of Cape Disappointment within the State of Washington and the westerly shore of Sand Island, and the said channel as so constituted marks

the boundary line between the States of Oregon and Washington.

FINDING OF FACT NO. 3

That there is abutting from Sand Island a body of sands which forms the southerly and extreme southwesterly shore line of said Island and the same is subject to overflow between high and low tide. The [44] sands here referred to are more particularly described by reference to the map and chart hereto attached, marked Exhibit "A" and made a part hereof, and with particular reference to the area circumscribed and colored in yellow on said map and chart. These sands have formed as accretions and additions to Sand Island through the normal processes of the waves, winds, tides and currents of the Columbia River, which said waves, winds, tides and currents have caused particles of sand and a certain sand bar and/or bars, situate during years previous to the south and west of Sand Island, to be broken up and shifted, to become attached to said Sand Island by a slow and imperceptible process; the said sands so formed constitute an accretion and an addition to Sand Island and form a part thereof.

The southerly and extreme southwesterly shoreline of said Sand Island abuts upon and faces, without obstruction, the main body of the Columbia River and embraces certain fishing sites and locations situate westerly of the most westerly dike on said Sand Island, and this said area is the same

as that last above-mentioned and which is circumscribed and defined in yellow on the map and chart marked Exhibit "A" and made a part hereof.

FINDING OF FACT NO. 4

That the waters of the Columbia River adjacent to Sand Island are frequented by salmon, and the sands abutting from the mainland of said Sand Island along the southerly and extreme southwesterly shore are peculiarly adapted for use in the drawing of seines and floating fishing gear, and the said sands have had at all times herein mentioned, and do now have, great value as sites and locations for the carrying on of fishing operations.

FINDING OF FACT NO. 5

That the Columbia River Packers Association, defendant herein, was at all times mentioned herein with respect to the operations of said company, and now is, a corporation duly organized and existing [45] under and by virtue of the laws of the State of Oregon, and during said times has been engaged, among other things, in the business of fishing for salmon and operating salmon canneries.

That the Baker's Bay Fish Company, defendant herein, was at all times mentioned herein with respect to the operations of said company, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Washington and during said times has been engaged, among other things, in the business of fishing for salmon and operating salmon canneries.

FINDING OF FACT No. 6

That on the 27th day of March, 1930, the defendants, H. J. Barbey and the Columbia River Packers Association, defendants herein, leased from plaintiff, for seining and fishing purposes only, for a period of five years, certain fishing sites and locations styled as Sites Numbered, 1, 2, 3, 4, and 5, which said sites embrace a continuous area along the southerly and extreme southwesterly shore of Sand Island; that said defendants and each of them, including the Baker's Bay Fish Company, after having occupied said Sand Island under the terms of the lease last above referred to for two successive seasons, to-wit: for the years 1930 and 1931, thereupon secured a cancellation thereof as of the 10th day of May, 1932; that thereafter, and during the fishing seasons of 1933 and 1934, the said defendants continued to use that portion of the said fishing sites and locations which extends westerly from the most westerly dike situate on the south shore of Sand Island, described as to approximate location by reference to the map and chart hereto attached marked Exhibit "A" and made a part hereof, and by further particular reference to that portion of said map and chart embraced and circumscribed in yellow thereon; that the said properties and sites were so used for the carrying on of fishing operations during the years 1933 and 1934, as aforesaid, without authority or lease or license of and from the plaintiff and in defiance of plaintiff's right [46] to absolute and exclusive possession of said premises.

FINDING OF FACT No. 7

That the defendants have threatened, and are now threatening, to enter upon the fishing sites and locations upon Sand Island embracing the sands situate along the southerly and extreme southwest-erly shore of said Island, being the sands situate between high and low tides, heretofore described and referred to as the area embraced in yellow on the map hereto attached and marked Exhibit "A" hereof, and to conduct fishing operations thereon, and unless said defendants, and each of them, are restrained by this court from entering upon and repeating the occupancy of said premises without right or authority as aforesaid, the said defendants will occupy the said fishing sites and locations for the fishing season of 1933 and succeeding years, to the irreparable injury and damage of plaintiff.

FINDING OF FACT No. 8

That the defendants have no right, title and/or interest in and to Sand Island and/or the sands which abut therefrom between high and low tides and which have heretofore been more particularly described by reference to the map and chart marked Exhibit "A" and with particular reference to the area on said map defined in yellow, and said defendants have never enjoyed rights or interests therein, save such as were obtained by said defendants by and under leases regularly entered into between said defendants, or either or any of them, and the plaintiff, United States of America; that said defendants should be restrained from conduct-

ing fishing operations on said premises and occupying the same.

FINDING OF FACT No. 9

That plaintiff has no plain, speedy or adequate remedy at law.

And the Court, being fully advised in the premises, does find the following: [47]

CONCLUSION OF LAW No. 1

That the State of Oregon granted to plaintiff, United States of America, on the 21st day of October, 1864, and unqualified fee in and to Sand Island, which said Island was described in the Legislative Act granting said premises as follows:

“Section 1. There is hereby granted to the United States all right and interest of the State of Oregon, in and to the land in front of Fort Stevens, and Point Adams, situate in this state, and subject, to overflow between high and low tides, and also to Sand Island, situate at the mouth of the Columbia River in this state; the said island being subject to overflow between high and low tides.”

That the said Sand Island is and for many years last past has been located within Clatsop County, State of Oregon, and within the jurisdiction of this Court; that for many years last past, save for the occupation of said premises under licenses and leases executed by plaintiff from time to time and save for the encroachment of defendants as of the years 1933 and 1934, as hereinafter recited, plaintiff has

been entitled to the exclusive possession of Sand Island as holder of the unqualified fee and has so possessed the same as a military reservation of the United States, and said plaintiff is now the exclusive holder thereof and entitled to the exclusive possession thereof.

CONCLUSION OF LAW No. 2

That the North Ship Channel of the Columbia River is an existent channel, which takes a course westerly and northerly of Sand Island through Baker Bay and proceeds thence southerly into the main or south channel of the Columbia River between the eastern shore of Cape Disappointment, within the State of Washington, and the westerly shore of Sand Island; the said channel as so constituted marks the boundary line between the States of Oregon and Washington.

CONCLUSION OF LAW No. 3

That the Columbia River Packers Association, defendant herein, was at all times mentioned herein with respect to the operations of said company, and now is, a corporation duly organized and existing [48] under and by virtue of the laws of the State of Oregon and during said times has been engaged, among other things, in the business of fishing for salmon and operating salmon canneries.

That the Baker's Bay Fish Company, defendant herein, was at all times mentioned herein with respect to the operations of said company, and now

is, a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and during said times has been engaged, among other things, in the business of fishing for salmon and operating salmon canneries

CONCLUSION OF LAW No. 4

That the sands abutting upon and from the main land of Sand Island and which form the southerly and extreme southwesterly shore line thereof between high and low tides have formed as accretions and additions to Sand Island and are a part and parcel thereof and the property of the United States of America. The southerly and extreme southwesterly shore line of Sand Island abuts upon and faces, without obstruction, the main body of the Columbia River, and the westerly portion of said shore line embraces certain fishing sites and locations situate upon sands which abut from the main land of Sand Island and which are subject to overflow between high and low tides, which said fishing locations are more particularly described by reference to the map and chart hereto attached, marked Exhibit "A" and made a part hereof, and the same are designated by the area circumscribed and defined in yellow thereon and hereinafter referred to as the "fishing sites and locations."

CONCLUSION OF LAW No. 5

That that certain lease or license granted by plaintiff to the Columbia River Packers Association,

defendant herein, and H. J. Barbey, defendant herein, under date of March 27, 1930, and which by its provisions was to extend for a period of five years from the date of its execution, was legally valid and binding and permitted occupancy of the fishing sites and locations hereinabove defined by said defendants up [49] to and until the 10th day of May, 1932, when the same was legally cancelled; that thereafter and during the fishing seasons of the years 1933 and 1934, respectively, the occupancy of Sand Island and the fishing sites and the locations aforesaid, appurtenant thereto, by said defendants was without right and constituted a trespass upon said properties and a violation and encroachment upon the right of the United States to have and hold absolute and exclusive possession of said Sand Island.

CONCLUSION OF LAW No. 6

That said defendants, and each of them, are without right, title, or interest in and to Sand Island or any part thereof, including the sands which have formed as accretions to Sand Island as aforesaid and which embrace the fishing sites and locations hereinabove more particularly described.

CONCLUSION OF LAW No. 7

That the defendants have threatened and are now threatening to enter upon the fishing sites and locations upon Sand Island heretofore described and to conduct fishing operations thereon, and unless defendants are permanently restrained and enjoined

from entering upon and conducting fishing operations upon said fishing sites and locations, the plaintiff herein will suffer irreparable injury and damage.

CONCLUSION OF LAW No. 8

That a decree should be entered herein enjoining the said Columbia River Packers Association, Baker's Bay Fish Company, and H. J. Barbey, permanently inhibiting and restraining said defendants, and each of them, and all their officers and agents and employees, from entering upon or occupying Sand Island and any part thereof, including the sands abutting therefrom and which form a part thereof, as aforesaid, and which embrace the fishing sites and locations hereinabove more particularly described and referred to.

CONCLUSION OF LAW No. 9

That plaintiff has no plain, speedy or adequate remedy at law. [50]

CONCLUSION OF LAW No. 10

That plaintiff is entitled to recover of and from the defendants its costs and disbursements incurred herein.

To all of which the defendants, and each of them, do hereby except and exception allowed.

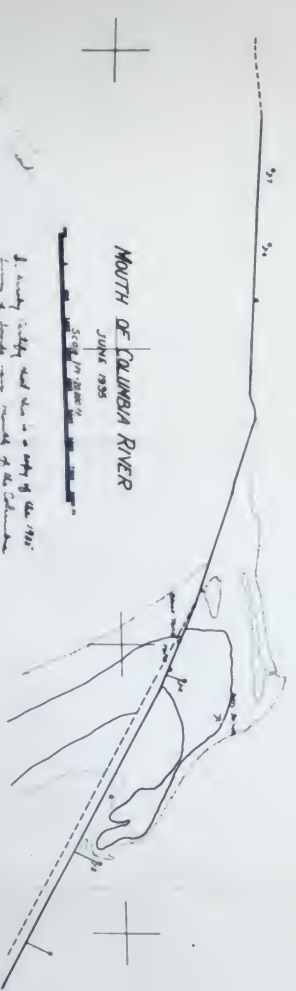
Dated at Portland, Oregon, this 9th day of August, 1935.

CHARLES C. CAVANAH

District Judge.

[Endorsed] Filed August 9, 1935. [51]





MOUTH OF COLUMBIA RIVER

JULY 1935

Scale 1/10,000

1. Survey of July and Aug. 1935
 2. Survey of March and April 1936
 3. Survey of May and June 1936
 4. Survey of July and Aug. 1936
 5. Survey of Sept. and Oct. 1936
 6. Survey of Nov. and Dec. 1936
 7. Survey of Jan. and Feb. 1937
 8. Survey of March and April 1937
 9. Survey of May and June 1937
 10. Survey of July and Aug. 1937
 11. Survey of Sept. and Oct. 1937
 12. Survey of Nov. and Dec. 1937
 13. Survey of Jan. and Feb. 1938
 14. Survey of March and April 1938
 15. Survey of May and June 1938
 16. Survey of July and Aug. 1938
 17. Survey of Sept. and Oct. 1938
 18. Survey of Nov. and Dec. 1938
 19. Survey of Jan. and Feb. 1939
 20. Survey of March and April 1939
 21. Survey of May and June 1939
 22. Survey of July and Aug. 1939
 23. Survey of Sept. and Oct. 1939
 24. Survey of Nov. and Dec. 1939
 25. Survey of Jan. and Feb. 1940
 26. Survey of March and April 1940
 27. Survey of May and June 1940
 28. Survey of July and Aug. 1940
 29. Survey of Sept. and Oct. 1940
 30. Survey of Nov. and Dec. 1940
 31. Survey of Jan. and Feb. 1941
 32. Survey of March and April 1941
 33. Survey of May and June 1941
 34. Survey of July and Aug. 1941
 35. Survey of Sept. and Oct. 1941
 36. Survey of Nov. and Dec. 1941
 37. Survey of Jan. and Feb. 1942
 38. Survey of March and April 1942
 39. Survey of May and June 1942
 40. Survey of July and Aug. 1942
 41. Survey of Sept. and Oct. 1942
 42. Survey of Nov. and Dec. 1942
 43. Survey of Jan. and Feb. 1943
 44. Survey of March and April 1943
 45. Survey of May and June 1943
 46. Survey of July and Aug. 1943
 47. Survey of Sept. and Oct. 1943
 48. Survey of Nov. and Dec. 1943
 49. Survey of Jan. and Feb. 1944
 50. Survey of March and April 1944
 51. Survey of May and June 1944
 52. Survey of July and Aug. 1944
 53. Survey of Sept. and Oct. 1944
 54. Survey of Nov. and Dec. 1944
 55. Survey of Jan. and Feb. 1945
 56. Survey of March and April 1945
 57. Survey of May and June 1945
 58. Survey of July and Aug. 1945
 59. Survey of Sept. and Oct. 1945
 60. Survey of Nov. and Dec. 1945
 61. Survey of Jan. and Feb. 1946
 62. Survey of March and April 1946
 63. Survey of May and June 1946
 64. Survey of July and Aug. 1946
 65. Survey of Sept. and Oct. 1946
 66. Survey of Nov. and Dec. 1946
 67. Survey of Jan. and Feb. 1947
 68. Survey of March and April 1947
 69. Survey of May and June 1947
 70. Survey of July and Aug. 1947
 71. Survey of Sept. and Oct. 1947
 72. Survey of Nov. and Dec. 1947
 73. Survey of Jan. and Feb. 1948
 74. Survey of March and April 1948
 75. Survey of May and June 1948
 76. Survey of July and Aug. 1948
 77. Survey of Sept. and Oct. 1948
 78. Survey of Nov. and Dec. 1948
 79. Survey of Jan. and Feb. 1949
 80. Survey of March and April 1949
 81. Survey of May and June 1949
 82. Survey of July and Aug. 1949
 83. Survey of Sept. and Oct. 1949
 84. Survey of Nov. and Dec. 1949
 85. Survey of Jan. and Feb. 1950
 86. Survey of March and April 1950
 87. Survey of May and June 1950
 88. Survey of July and Aug. 1950
 89. Survey of Sept. and Oct. 1950
 90. Survey of Nov. and Dec. 1950
 91. Survey of Jan. and Feb. 1951
 92. Survey of March and April 1951
 93. Survey of May and June 1951
 94. Survey of July and Aug. 1951
 95. Survey of Sept. and Oct. 1951
 96. Survey of Nov. and Dec. 1951
 97. Survey of Jan. and Feb. 1952
 98. Survey of March and April 1952
 99. Survey of May and June 1952
 100. Survey of July and Aug. 1952

AND AFTERWARDS, to wit, on Friday, the 9th day of August, 1935, the same being the 30th Judicial day of the Regular July Term of said Court; present the Honorable Charles C. Cavanah, United States District Judge for the District of Idaho, presiding, the following proceedings were had in said cause, to wit: [53]

In the District Court of the United States
for the District of Oregon

No. E-9471

UNITED STATES OF AMERICA,

Plaintiff,

vs.

COLUMBIA RIVER PACKERS ASSOCIATION,
a corporation; BAKER'S BAY FISH COM-
PANY, a corporation; and H. J. BARBEY,
Defendants.

DECREE

On the 11th day of June, 1935, upon bill of complaint, answer and reply, and full proofs of the respective parties, comprising testimony of numerous witnesses, who were subjected to cross-examination and documentary proofs, plaintiff, United States of America, appearing and being represented by Edwin D. Hicks, Assistant United States Attorney for the District of Oregon, defendants appearing jointly and being represented by the Honorable A. E. Clark and the Honorable Jay Bowerman, and the

said attorneys for the respective parties having been heard orally and upon briefs filed herein, and the Court being fully advised in the premises,

NOW THEREFORE, upon consideration thereof and on motion of the attorney for complainant, it is this day ORDERED, ADJUDGED AND DECREED as follows, viz:

FIRST: That plaintiff is the owner and entitled to the immediate and exclusive possession of that tract of land and island known as Sand Island which said island is described as follows:

That certain island commonly known and referred to as Sand Island, situate within the estuary and near the mouth of the Columbia River, United States of America, within Clatsop County, State of Oregon.

The said Sand Island is bordered on the north and east by a body of water styled as Baker Bay, on the south by the main body of the Columbia River, and on the west by a channel of water leading from Baker Bay into the main Columbia River, which said channel is commonly known and referred to as the [54] North ship channel of the Columbia River;

that said description embraces all sands and tide flats between high and low water abutting upon and projecting from Sand Island, with particular reference to the sands and tide flats situate along the southerly and westerly shore of said Island, which it is hereby decreed have become a part and parcel

of Sand Island by process of accretion. For a more particular description of Sand Island, reference is made to the map and chart hereto attached marked exhibit "A" and made a part hereof. The area designated on Sand Island as "Sands" and colored in yellow is the area which is hereby decreed to have formed as an accretion to Sand Island.

SECOND: That the defendants, and each or any of them, have no right, title or interest in and to Sand Island and/or the sands abutting therefrom on the southerly and westerly shore thereof, being the sands above-mentioned which have formed as accretions to said Island.

THIRD: That a permanent injunction issue out of and under the seal of this court, directed to the defendants, Columbia River Packers' Association, a corporation; Baker's Bay Fish Company, a corporation, and H. J. Barbey, and their officers, agents, servants, employees and attorneys, and those in active concern or participating with them, and each and every of them, enjoining and restraining them, and each of them, from occupying or attempting to occupy Sand Island and/or the sands and tideflats situate upon the southerly and westerly shore thereof between high and low tides and which are herein decreed to form a part of said Island.

This direction shall not apply to said defendants, or any of them, where such occupancy is undertaken pursuant to leases or licenses which may be granted by the United States of America or its successors in interest authorizing such occupancy.

FOURTH: That the motion of defendants to dismiss the bill of complaint herein, as amended, for want of jurisdiction and for want of parties be, and it hereby is, denied.

FIFTH: That the United States of America, plaintiff, do recover [55] from the defendants its costs of this suit, to be taxed by the Clerk.

The defendants and each of them except and exception allowed.

Dated at Portland, Oregon, this 9th day of August, 1935.

CHARLES C. CAVANAH

[Printer's Note: Attached to the original Decree is a map Exhibit "A". Being identical with the map Exhibit "A" shown at end of the Findings of Fact and Conclusions of Law [see p. 58] it is not, for reasons of economy, again shown here.]

[Endorsed]: Filed August 9, 1935. [56]

AND AFTERWARDS, to wit, on the 31st day of October, 1935, there was duly filed in said Court, a PETITION FOR APPEAL, in words and figures as follows, to-wit: [58]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Petitioners, Columbia River Packers Association, a corporation, Baker's Bay Fish Company, a corporation and H. J. Barbey, defendants above named, conceiving themselves aggrieved by the Decree, made and entered in this suit on the 9th day of August, 1935, in the above entitled court and cause, do hereby appeal from said Decree, and the whole thereof, to the United States Circuit Court of Appeals, for the Ninth Circuit, and hereby file their Assignments of Error asserted and relied upon by them upon said appeal, and petitioners pray that said appeal may be allowed, that citation issue herein as provided by law, that an order be entered herein fixing the amount of the bond to be given by petitioners upon such appeal, the same to act as a cost bond, and that a transcript of the record, proceedings and papers upon which said decree was made and entered be duly authenticated and sent to the [59] United States Circuit Court of Appeals, for the Ninth Circuit sitting in San Francisco.

Dated this 31st day of October, 1935.

COLUMBIA RIVER PACKERS
ASSOCIATION,

by W. L. THOMPSON, Pres.

BAKER'S BAY FISH COMPANY,

by W. L. THOMPSON, Pres.

H. J. BARBEY

Petitioners.

CLARK & CLARK

JAY BOWERMAN

Solicitors for Petitioners-Defendants. [60]

District of Oregon,

State of Oregon,

County of Multnomah.—ss.

Due service of the within Petition for Appeal is hereby accepted this 31st day of October, 1935, by receiving a copy thereof, duly certified to as such by A. E. Clark, of attorneys for defendants-petitioners.

UNITED STATES OF AMERICA,

by CARL C. DONAUGH,

United States Attorney,

Attorney for plff.

State of Oregon,

County of Multnomah,

District of Oregon.—ss.

Due and timely service of the foregoing Petition for Allowance of Appeal, together with receipt of a copy thereof duly certified as such by A. E. Clark, one of the attorneys for defendants-appellants, is

hereby admitted at Portland, Oregon, this 31 day of October, 1935.

I. H. VAN WINKLE

Attorney General of the State of Oregon.

RALPH E. MOODY,

Attorney for the State of Oregon.

Due and timely service of the attached Defendants' petition for appeal by receipt of a true copy thereof, acknowledged this 31st day of October, 1935.

G. W. HAMILTON,

Attorney General of the State of Washington.

R. G. SHARPE,

Assistant Attorney General of the State of Washington,

Attorneys for the State of Washington.

[Endorsed]: Filed October 31, 1935. [61]

AND AFTERWARDS, to wit, on the 31st day of October, 1935, there was duly filed in said Court, an ASSIGNMENT OF ERRORS, in words and figures as follows, to-wit: [62]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR

Columbia River Packers Association, a corporation, Baker's Bay Fish Company, a corporation and H. J. Barbey, the defendants above named, complain of the Findings of Fact and Conclusions of

Law and the final Decree made and entered in the above entitled cause on the 9th day of August, 1935, and aver that in the proceedings in said cause, and in said Findings of Fact, Conclusions of Law and in said Decree found, manifest error has occurred to the prejudice of defendants, of which they make the following

ASSIGNMENTS OF ERROR

which they assert and intend to urge and rely upon in the Circuit Court of Appeals for the Ninth Circuit, upon their appeal herein:

I.

Error in finding and holding that a map or chart attached to the Findings of Fact and Conclusions of Law as Exhibit "A," was a complete and detailed description of Sand Island and its appurtenants, and in holding that said map [63] shows the approximate location of Sand Island with the sands abutting from the southerly shore thereof, and in holding that said exhibit is either a complete detailed or accurate description of Sand Island.

II.

Error in finding and holding, in substance, that the defendants encroached upon any of the rights or premises of the plaintiff in the years 1933 and 1934, or either of said years; and in finding and holding, in substance, that Exhibit "A" was a true description of Sand Island and that the plaintiff owned the property shown on said Exhibit "A"

and was in the exclusive possession thereof for many years, or at all.

III.

Error in holding and finding, in substance, that the North Ship Channel of the Columbia River proceeds from Baker's Bay southerly into the west or south channel of the Columbia River between the eastern shore of Cape Disappointment within the State of Washington, and the westerly shore of Sand Island as delineated on said map, Exhibit "A", and in finding and holding that the said channel so described in said Findings marks the boundary line between the states of Oregon and Washington, and in making any holding or finding with respect to the boundary line between said states.

IV.

Error in finding and holding, in substance, that there is abutting from Sand Island a body of sands which forms the southerly and extreme southwesterly shore line of said island, and in finding and holding that the same is subject to overflow between high and low tide. [64]

V.

Error in finding and holding, in substance, that the area colored in yellow on said Exhibit "A" is a part of Sand Island.

VI.

Error in finding and holding, in substance, that the body of sands south and west of Sand Island

and colored in yellow in said Exhibit "A" are accretions to Sand Island formed through slow and imperceptible process, or that they constitute an accretion to and are a part of Sand Island.

VII.

Error in finding and holding, in substance, that the southerly and extreme southwesterly shore line of Sand Island abuts upon and faces without obstruction the main body of the Columbia River, and embraces fishing sites and locations situate westerly of the most westerly dike on said Sand Island.

VIII.

Error in finding and holding, in substance, that the westerly and southwesterly shores of Sand Island are peculiarly adapted for the drawing of seines and floating fish gear, and that they have had, at the times mentioned in the findings, and now have, great or any value as locations for carrying on fishing operations.

IX.

Error in finding and holding, in substance, that Sites Nos. 1, 2, 3, 4 and 5, described in the lease dated March 27, 1930, between the United States as lessor, and the defendants H. J. Barbey and Columbia River Packers Association as lessees, embrace a continuous area along the southerly and extreme southwesterly shore of Sand Island. [65]

X.

Error in finding and holding, in substance, that after August 25, 1931, and during the fishing seasons of 1933 and 1934, or at all, the defendants used or continued to use that portion of said fishing Sites Nos. 1, 2, 3, 4 and 5 referred to in the last preceding Assignment of Error westerly of the most westerly dike situated on the south shore of Sand Island, or that said defendants, or either thereof, after August 25, 1931, used or occupied any part of Sand Island or the shore thereof for fishing operations or for any other use or purpose whatsoever.

XI.

Error in finding and holding, in substance, that the defendants, or either thereof, at any time after August 25, 1931, entered upon or threatened to enter upon the above described fishing sites and locations on Sand Island, or any part of *Said* Island whatsoever, or to use the southerly and extreme south-westerly shore line of said island, or any part thereof, for fishing operations or for any purpose whatsoever; and in finding and holding, in substance, that at the time this suit was commenced, or at any time thereafter, or when the said Findings, Conclusions and Decree were entered, the defendants, or either thereof, threatened, intended or had any purpose to enter upon said fishing sites, or any part of Sand Island for any purpose whatsoever.

XII.

Error in finding and holding, in substance, and effect, that the defendants, or either thereof, at

the time this suit was commenced, or at any time thereafter, threatened or intended to enter upon any part of Sand Island or any part [66] of the premises in dispute in this suit, to conduct fishing operations thereon, or for any other purpose.

XIII.

Error in finding and holding, in substance and effect, that unless restrained the said defendants will occupy the said fishing sites and locations for fishing operations in the season of 1935 and succeeding years.

XIV.

Error in finding and holding that the defendants have no right, title or interest in Sand Island or the sands lying southerly or southwesterly thereof, and that defendants never enjoyed any rights or interest therein save such as were given by leases executed by the United States.

XV.

Error in finding and holding that the plaintiff has no plain, speedy or adequate remedy at law.

XVI.

Error in reiterating all of the aforechallenged findings in the several Conclusions of Law.

XVII.

Error in decreeing that plaintiff is the owner and entitled to the immediate and exclusive possession of the tract of land known as Sand Island, and

“that said Sand Island is bordered on the north and east by a body of water styled as Baker’s Bay, and on the west by a channel of water leading from Baker’s Bay into the main Columbia River, which said channel is commonly known and referred to as the North Ship Channel of the Columbia River.”

XVIII.

Error in decreeing that Sand Island embraces all sands and tide flats between high and low water abutting upon and projecting from Sand Island, with particular reference to [67] the sands and tide flats along the southerly and westerly shore of Sand Island.

XIX.

Error in decreeing that said sands, which are the premises in dispute in this suit, became a part and parcel of Sand Island by accretion.

XX.

Error in decreeing that the defendants, and each of them, have no right, title or interest in or to Sand Island as above described.

XXI.

Error in decreeing that a permanent injunction issue against the defendants, their officers, agents, servants, employees and attorneys, enjoining and restraining them, and each of them, from occupying

or attempting to occupy the sands or tide flats southerly and westerly along the southerly and westerly shore of Sand Island, which are the premises in dispute herein.

XXII.

Error in denying the motion of defendants to dismiss the bill of complaint and this suit because of the absence of indispensable parties and because the Court had no jurisdiction.

XXIII.

Error in denying the motion of the State of Washington for leave to intervene in this suit.

XXIV.

Error in denying the motion of the State of Oregon for leave to intervene in this suit.

XXV.

Error in decreeing that the plaintiff was the owner [68] of the premises in controversy in this suit, or that the same, or any part thereof, constituted an accretion to Sand Island.

XXVI.

Error in decreeing that neither the State of Oregon nor the State of Washington was an indispensable party, and that the Court had jurisdiction without their presence to enter a decree other than a decree of dismissal.

XXVII.

Error in not entering a decree of dismissal in this suit.

XXVIII.

Error in decreeing that plaintiff should recover from defendants its costs and disbursements.

WHEREFORE Defendants-appellants pray that the decree may be reversed.

COLUMBIA RIVER PACKERS
ASSOCIATION

By W. L. THOMPSON
BAKER'S BAY FISH COMPANY
By W. L. THOMPSON
H. J. BARBEY

CLARK & CLARK
JAY BOWERMAN

Attorneys for Defendants-Appellants. [69]

District of Oregon,
State of Oregon,
County of Multnomah—ss.

Due service of the within Assignments of Error is hereby accepted in Multnomah County, Oregon, this 31 day of October, 1935, by receiving a copy thereof, duly certified to as such by A. E. Clark of Attorneys for Defendants.

CARL C. DONAUGH

Attorney for Plaintiff.

State of Oregon,
County of Multnomah,
District of Oregon—ss.

Due and timely service of the foregoing Assignments of Error, together with receipt of a copy thereof duly certified as such by A. E. Clark, one of the attorneys for defendants-appellants, is hereby admitted at Portland, Oregon, this 31st day of October, 1935.

I. H. VAN WINKLE

Attorney General of the State
of Oregon.

RALPH E. MOODY,

Ass't Atty. Gen'l

Attorneys for the State of Oregon.

Due and timely service of the attached Defendant's assignments of error by receipt of a true copy thereof, acknowledged this 31st day of October, 1935.

G. W. HAMILTON

Attorney General of the State
of Washington

R. G. SHARPE

Assistant Attorney General
of the State of Washington,

Attorneys for the State of Washington.

[Endorsed]: Filed October 31, 1935. [70]

AND AFTERWARDS, to wit, on Saturday, the 1st day of November, 1935, the same being the 79th judicial day of the regular July, 1935, term of said Court; present the Honorable Charles C. Cavanah, United States District Judge for the District of Idaho, presiding, the following proceedings were had in said cause, to wit: [71]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The defendants in the above entitled cause having prayed for the allowance of an appeal in this cause to the United States Circuit Court of Appeals, for the Ninth Circuit, from the Decree made and entered in said cause by the District Court of the United States, for the District of Oregon, on August 9th, 1935, and from each and every part thereof, and having presented and filed their petition for appeal, assignments of error and prayer for reversal, pursuant to the statutes and rules in such cases provided, it is therefore,

ORDERED that the petition of said defendants for the allowance of an appeal, and their said appeal to the United States Circuit Court of Appeals, for the Ninth Circuit be, and the same are hereby granted and allowed, and it is further

ORDERED that the amount of the bond on said appeal to be given by the said defendants to act as a cost bond be, and the same is hereby fixed at the sum of \$300.00, and it is further

ORDERED that the Clerk of this Court prepare and certify a transcript of the record, proceedings

and decree in this cause and all other papers and documents pertinent to and necessary for a determination of said appeal and transmit the same to the [72] United States Circuit Court of Appeals, for the Ninth Circuit, within the time and in the manner provided by the statutes of the United States and the rules of Court.

Dated this 1st day of November, 1935.

CHARLES C. CAVANAH

Judge of the United States District Court,
for the District of Oregon, presiding
in said cause.

District of Oregon,
State of Oregon,
County of Multnomah—ss.

Due service of the within Order allowing Appeal, is hereby accepted in Multnomah County, Oregon, this 3rd day of November, 1935, by receiving a copy thereof, duly certified to as such by A. E. Clark, of attorneys for Defendants.

EDWIN D. HICKS,

Of Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,
District of Oregon—ss.

Due and timely service of the foregoing Order Allowing Appeal and Fixing Bond, together with the receipt of a copy thereof duly certified as such by A. E. Clark, one of the attorneys for defendants-

appellants, is hereby admitted at Portland, Oregon, this 3rd day of November, 1935.

I. H. VAN WINKLE

Attorney General of the State
of Oregon.

RALPH E. MOODY

Attorney for the State of
Oregon.

Due and timely service of the attached Order Allowing Appeal by defendants by receipt of a true copy thereof, acknowledged this 3rd day of November, 1935.

G. W. HAMILTON

Attorney General of the State
of Washington.

R. G. SHARPE,

Assistant Attorney General of
the State of Washington.

Attorneys for the State of Washington.

[Endorsed]: Filed November 2, 1935. [73]

AND AFTERWARDS, to wit, on the 7th day of November, 1935, there was duly filed in said Court, a BOND ON APPEAL, in words and figures as follows, to wit: [74]

[Title of Court and Cause.]

COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS
That Columbia River Packers Association, a cor-

poration, Baker's Bay Fish Company, a corporation, and H. J. Barbey, as principals, and United States Fidelity and Guaranty Company, a corporation authorized to transact business in the State of Oregon, as surety, are held and firmly bound unto the United States of America, the above named plaintiff, and to the State of Oregon and to the State of Washington, petitioners for leave to intervene, and to each of them, in the just and full sum of \$300.00, for which sum well and truly to be paid, said defendants bind themselves and their successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 2nd day of Nov., 1935.

The condition of this obligation is such that

WHEREAS, on the 9th day of August, 1935, a decree was made and entered in the above entitled court and cause and defendants have petitioned for and have been allowed an appeal from said decree to the United States Circuit Court of Appeals, for the [75] Ninth Circuit to correct and reverse the said decree, and

WHEREAS the said District Court has by order fixed the bond or security to be given upon said appeal in the sum of \$300.00,

NOW, THEREFORE, the condition of this obligation is such that, if the above-named defendants and appellants, Columbia River Packers Association, a corporation, Baker's Bay Fish Company, a corporation, and H. J. Barbey, shall prosecute said

appeal to effect and answer all costs that may be awarded against them, or either of them, if they or either of them shall fail to make good their appeal and plea, then this obligation shall be void, otherwise to remain in full force and effect.

COLUMBIA RIVER PACKERS
ASSOCIATION,

by W. L. THOMPSON, Pres.

BAKER'S BAY FISH COMPANY

by W. L. THOMPSON, Pres.

H. J. BARBEY

Principals.

UNITED STATES FIDELITY

AND GUARANTY COMPANY

By G. B. ECKLES,

Its Attorney in Fact.

[Seal]

Surety.

Countersigned

R. W. SCHMEER CO.

By J. H. SCHMEER,

Resident Agent.

Approved

EDWIN D. HICKS,

Asst. U. S. Attorney.

The foregoing undertaking is accepted and approved, both as to form and as to surety.

CHARLES C. CAVANAUGH,

District Judge for the District of Oregon,
presiding in said cause. [76]

District of Oregon,
State of Oregon,
County of Multnomah.—ss.

Due service of the within Cost Bond on Appeal is hereby accepted this 4th day of November, 1935, by receiving a copy thereof, duly certified to as such by A. E. Clark, of attorneys for defendants.

UNITED STATES OF AMERICA,
by EDWIN D. HICKS

United States Attorney.

State of Oregon,
County of Multnomah,
District of Oregon.—ss.

Due and timely service of the foregoing Bond on Appeal together with receipt of a copy thereof, duly certified as such by A. E. Clark, one of the attorneys for defendants-appellants, is hereby admitted at Portland, Oregon, this 4 day of November, 1935.

I. H. VAN WINKLE

Attorney General of the State of Oregon

RALPH E. MOODY

Attorney for the State of Oregon

Due and timely service of the attached Bond on appeal of defendants by receipt of a true copy thereof, acknowledged this 4th day of November, 1935.

G. W. HAMILTON

Attorney General of the State of Washington

R. G. SHARPE

Assistant Attorney General of the State
of Washington

Attorneys for the State of Washington

[Endorsed]: Filed November 7, 1935. [77]

AND, to wit, on the 5th day of November, 1935, there was duly filed in said Court, a STIPULATION BETWEEN DEFENDANTS AND THE STATE OF OREGON TO SEND ORIGINAL EXHIBITS TO COURT OF APPEALS, in words and figures as follows, to wit: [78]

[Title of Court and Cause.]

STIPULATION

It is stipulated between the defendants and the State of Oregon that Plaintiff's Exhibits 1, 5, 6, 24, 29, 30 and 31, and Defendants' Exhibits 14, 15, 16, 17, 18, and 19A, 19B, 19C and 19D, consisting of maps, blueprints and photographs, are of such nature that it is impossible to incorporate the same in the printed record and the originals shall be transmitted to the Circuit Court of Appeals for the Ninth Circuit for its use and inspection, and that an order may be entered accordingly.

CLARK & CLARK

JAY BOWERMAN

Attorneys for Defendants

I. H. VAN WINKLE

Attorney General

R. E. MOODY

Ass't Att'y Gen'l

Attorneys for State of Oregon

[Endorsed]: Filed November 5, 1935. [79]

AND AFTERWARDS, to wit, on the 5th day of November, 1935, there was duly filed in said Court, a STIPULATION BETWEEN DEFENDANTS AND THE STATE OF WASHINGTON TO SEND ORIGINAL EXHIBITS TO THE COURT OF APPEALS, in words and figures as follows, to wit: [80]

[Title of Court and Cause.]

STIPULATION

It is stipulated between the defendants and the State of Washington that Plaintiff's Exhibits 1, 5, 6, 24, 29, 30 and 31, and Defendants' Exhibits 14, 15, 16, 17, 18, and 19A, 19B, 19C, and 19D, consisting of maps, blueprints and photographs, are of such nature that it is impossible to incorporate the same in the printed record and the originals shall be transmitted to the Circuit Court of Appeals for the Ninth Circuit for its use and inspection and that an order may be entered accordingly.

CLARK & CLARK,
JAY BOWERMAN

Attorneys for Defendants.

G. W. HAMILTON &

R. G. SHARPE,

Attorneys for State of Washington.

[Endorsed]: Filed November 5, 1935. [81]

AND AFTERWARDS, to wit, on Thursday, the 7th day of November, 1935, the same being the 4th Judicial Day of the Regular November, 1935 Term of said Court; present the Honorable Charles C. Cavanah, United States District Judge for the District of Idaho, presiding, the following proceedings were had in said cause, to wit: [82]

[Title of Court and Cause.]

ORDER

IT IS HEREBY ORDERED that the Court does hereby identify as received and considered in evidence in the above entitled cause Plaintiff's Exhibits 1, 2, 3, 5, 6, 24, 25, 29, 30 and 31, and Defendants' Exhibits 8, 9, 14, 15, 16, 17, 18, and 19A, 19B, 19C and 19D, 20, 21, 22 and 23, which said Exhibits are stamped and marked as filed in the United States District Court for the District of Oregon, in said cause, and does hereby declare the same as a part of the record on appeal in said cause; And It Is Further

ORDERED That the printing of said exhibits, and each of them, may be omitted, and that it shall not be necessary to print the same as a part of the record in said cause except in so far as the same are contained in the statement of the evidence; And It Is Further

ORDERED, That Plaintiff's Exhibits 1, 5, 6, 24, 29, 30 and 31, and Defendants' Exhibits 14, 15, 16, 17, 18, and 19A, 19B, 19C and 19D cannot be readily copied, and because of the character thereof it is impracticable and impossible to incorporate the

same in the printed record, and that the originals, [83] in lieu of such printing, shall be transmitted to the Circuit Court of Appeals for its use and inspection; And It Is Further

ORDERED, That all of the original exhibits shall be transmitted to the Clerk of the Circuit Court of Appeals at or before the time of argument of this cause on appeal.

Done and dated in open Court this 6th day of November, 1935.

CHARLES C. CAVANAH

District Judge for the District of Oregon,
presiding in said cause.

Approved this 4th day of Nov. 1935.

EDWIN D. HICKS,

Ass't U. S. Att'y.

[Endorsed]: Filed November 7, 1935. [84]

AND, to wit, on the 6th day of November, 1935, there was duly filed in said Court, a PRAECIPE FOR TRANSCRIPT, in words and figures as follows, to wit: [85]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the Above-entitled Court:

You will please prepare and certify the record on appeal in the above entitled cause for transmission to the United States Circuit Court of Appeals for the Ninth Circuit, including therein all papers and

proceedings had in the above-entitled cause which are necessary to the determination thereof in said Appellate Court and especially the following:

- (1) This Praeceptum.
- (2) Second Amended Bill of Complaint.
- (3) Answer of Defendants to Amended Bill of Complaint.
- (4) Findings of Fact and Conclusions of Law.
- (5) Final Decree.
- (6) Defendants-Appellants' Assignments of Error.
- (7) Petition for Appeal.
- (8) Order Allowing Appeal and Fixing Bond.
- (9) Bond on Appeal.
- (10) Citation on Appeal.
- (11) Order Regarding Exhibits.
- (12) Statement of Evidence and Trial Record.

[86]

- (13) Stipulation for extension of time for plaintiff to propose amendments to statement of evidence and presentation to the Court.
- (14) Order extending time therefor.

You are to certify each and all of Plaintiff's Exhibits 1, 2, 3, 5, 6, 24, 25, 29, 30 and 31 and Defendants' Exhibits 8, 9, 14, 15, 16, 17, 18, 19-A, 19-B, 19-C, 19-D, 20, 21, 22 and 23, the same not to be printed, except in so far as they are reproduced in the statement of evidence but to be made a part of the record on appeal.

Dated this 5th day of November, 1935.

CLARK & CLARK and
JAY BOWERMAN

Solicitors for Defendants-Appellants. [87]

District of Oregon,
State of Oregon,
County of Multnomah.—ss.

Due service of the within Praecipe for Transcript is hereby accepted in Multnomah County, Oregon, this 5th day of November, 1935, by receiving a copy thereof, duly certified to as such by A. E. Clark of Attorneys for Defendants.

EDWIN D. HICKS

Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,
District of Oregon.—ss.

Due and timely service of the foregoing Praecipe for Transcript on Appeal is hereby admitted, at Salem, Oregon, this 5th day of November, 1935, by receipt of a copy thereof, certified as such by A. E. Clark, one of the attorneys for defendants-appellants.

I. H. VAN WINKLE

Attorney General of the State of Oregon.

RALPH E. MOODY

Assistant Attorney General,

Attorneys for the State of Oregon.

District of Oregon,
State of Oregon,
County of Multnomah.—ss.

Due service of the foregoing Praecipe for Transcript on Appeal of the defendants on appeal in suit No. E-9471, in the District Court of the United States, for the District of Oregon, wherein the

United States of America in plaintiff and Columbia River Packers Association, a corporation, Bakee's Bay Fish Company, a corporation, and H. J. Barbey are defendants, and receipt of a true copy thereof, duly certified to be such by A. E. Clark, one of the attorneys for the defendants, is hereby acknowledged at Portland, Oregon, this 5th day of November, 1935.

G. W. HAMILTON &
R. G. SHARPE

Attorneys for the State of Washington.

[Endorsed]: Filed November 5, 1935. [88]

AND AFTERWARDS, to wit, on the 7th day of November, 1935, there was duly filed in said Court, a STIPULATION FOR ORDER ENLARGING TIME TO PROPOSE OBJECTIONS OR AMENDMENTS TO PROPOSED STATEMENT OF THE EVIDENCE, in words and figures as follows, to wit: [89]

[Title of Court and Cause.]

STIPULATION

WHEREAS a statement of the evidence and trial record in this suit was heretofore prepared and lodged with the Clerk of the above-entitled court by defendants for examination of plaintiff and notice thereof given as provided in subdivision (b) of Equity Rule 75 and that because of trial engagements and other professional engagements the

solicitors for plaintiff have not had time and opportunity to prepare the objections and amendments thereto which they desire to propose. It is therefore STIPULATED by and between the solicitors of record for the plaintiff and defendants that an order may be entered herein extending the time for proposing objections and amendments and the presentation of said statement of evidence to the Court for its approval to and including November 20th, 1935.

Dated this 5th day of November, 1935.

EDWIN D. HICKS

Solicitors for Plaintiff.

CLARK & CLARK

JAY BOWERMAN

Solicitors for Defendants.

[Endorsed]: Filed November 7, 1935. [90]

AND AFTERWARDS, to wit, on Thursday, the 7th day of November, 1935, the same being the 4th Judicial Day of the Regular November, 1935 Term of said Court; present the Honorable Charles C. Cavanah, United States District Judge for the District of Idaho, presiding, the following proceedings were had in said cause, to wit: [91]

[Title of Court and Cause.]

ORDER EXTENDING TIME.

Based upon the stipulation of the parties to this suit through their solicitors of record, and for good cause shown, it is hereby

ORDERED that the time within which the plaintiff may make objections and propose amendments to the statement of the evidence and trial record, heretofore lodged with the Clerk of the above-entitled Court, and the presentation of said objections and proposed amendments and said statement to the Court for its approval, is hereby extended to and including November 20, 1935.

Dated this 6th day of November, 1935.

CHARLES C. CAVANAH

Judge of the United States District Court for the District of Oregon, presiding in the above-entitled cause.

[Endorsed]: Filed November 7, 1935. [92]

AND AFTERWARDS, to wit, on the 19th day of November, 1935, there was duly filed in said Court, a STIPULATION RELATIVE TO ORIGINAL EXHIBITS, in words and figures as follows, to wit:

[93]

[Title of Court and Cause.]

STIPULATION.

It is STIPULATED by and between the plaintiff and defendants herein, through their respective solicitors of record, that an order may be entered herein

(a) That the original exhibits in this case shall be retained in the custody of the clerk of the above-entitled court at Portland, Oregon, for use of the

parties in the preparation of their briefs, and shall be transmitted to the clerk of the Circuit Court of Appeals a convenient time before argument of the cause in said Court; and

(b) That there shall be transmitted by the clerk of said District Court to the clerk of the Circuit Court of Appeals a convenient time before the argument of this cause in the last named court the transcript of the evidence and trial record certified by the court reporter, and on file with the clerk of said District Court, and that the solicitors for either party may refer to said transcript in their briefs and arguments and call the attention of the Circuit Court of Appeals to the same, or any part thereof.

Dated this 14 day of November, 1935.

EDWIN D. HICKS

Solicitors for Plaintiff.

CLARK & CLARK

JAY BOWERMAN

Solicitors for Defendant.

[Endorsed]: Filed November 19, 1935. [93½]

AND AFTERWARDS, to wit, on Tuesday, the 19th day of November, 1935, the same being the 13th Judicial day of the Regular November, 1935 Term of said Court; present the Honorable Charles C. Cavanah, United States District Judge for the District of Idaho, presiding, the following proceedings were had in said cause, to wit: [94]

[Title of Court and Cause.]

ORDER.

Based upon the stipulation of the plaintiff and defendants through their respective solicitors of record, and for good cause shown, it is

ORDERED that the original exhibits in this cause shall, for the time being be retained in the custody of the clerk of the above entitled court at Portland, Oregon, for use of the parties in the preparation of their briefs herein, and shall be transmitted to the clerk of the Circuit Court of Appeals a convenient time before the argument of this cause upon appeal. And it is further

ORDERED that the clerk of said District Court shall transmit to the Circuit Court of Appeals a convenient time before argument of this cause on appeal, the transcript of the evidence and trial record made and certified by the court reporter, and filed with the clerk of said District Court, and that either party in their briefs or upon oral argument may refer thereto and call the attention of the Appellate Court to the same or any part thereof, but no part of said transcript shall be printed.

Dated this 18th day of November, 1935.

CHARLES C. CAVANAH

Judge of the United States District Court,
presiding in said cause.

[Endorsed]: Filed November 19, 1935. [941½]

AND AFTERWARDS, to wit, on the 19th day of November, 1935, there was duly filed in said Court, a STATEMENT OF THE EVIDENCE, in words and figures as follows, to wit: [95]

[Title of Court and Cause.]

STATEMENT OF THE EVIDENCE AND
TRIAL RECORD.

The following is defendants-appellants condensed statement in narrative form of what occurred upon and during the trial of this suit and the testimony introduced upon said trial, made in pursuance of Equity Rule 75(b), and lodged in the Clerk's office for the examination of the plaintiff as provided by said rule: [96]

At the opening of the trial, the Court denied the motion of the State of Oregon for leave to intervene and file a petition in intervention, and vacated the conditional order theretofore made by Judge Fee permitting the State of Washington to intervene and file a petition in intervention, and denied the motion of the State of Washington for leave to intervene and file a petition in intervention, and in connection therewith delivered the following oral opinion:

“COURT: I appreciate, Gentlemen, you have a question of jurisdiction between the United States and the states. We have a statute, as I recall it, which provides that an action between the government and the states involving title to property, the Supreme Court of the United

States has original jurisdiction. The question, I recall, was presented to me some two years ago, in which a controversy arose over the ownership of property as between the government and the State of Idaho. I declined jurisdiction. The question was thoroughly gone into. Under that statute Congress has granted original jurisdiction in the Supreme Court of the United States in controversies over ownership of property between the government and the state. Now, with that [97] statute in mind, if the court permits these petitions for intervention of the States of Oregon and Washington, I will be assuming original jurisdiction here, when it belongs in the Supreme Court of the United States, and I doubt whether any theory of this court would avail you anything at all. Why did Congress enact that statute giving the Supreme Court original jurisdiction? I have an idea that Congress had in mind in giving the Supreme Court original jurisdiction, that it would not involve the District Judges of the different states. Now if these petitions are permitted you are going to have here the statement of counsel both for the states of Oregon and Washington, primarily a question of jurisdiction on the facts, which the court will have to determine. If I would hear this case and permit these states to intervene and the court should finally determine on the evidence that this property is situated in the State of Washington, it divests this court of

jurisdiction at once, and you avail yourself of nothing. If the court should determine that the property is in the State of Oregon, if it had any jurisdiction of course it would retain jurisdiction. If we ignore this statute I call your attention to the original jurisdiction being vested in the Supreme Court of the United [98] States in a controversy of this sort between the government and the states. Now there is your complication. If we take testimony here and the court should conclude the property is situated in Washington it declines jurisdiction and the government goes over in the State of Washington and brings a similar suit, and the State of Oregon raises a similar question, and the judge over there should hold the property was not in the State of Washington, where would you be? You would be in the same situation you would be here. That is the purpose of that statute granting original jurisdiction to the Supreme Court in controversies between the state and the government over the ownership of property. You can see what the result might be. Now the states are not necessary parties in this litigation, as I view it. This court can go on and determine the controversy between the government and these defendants. It is true it would not bind the state of Oregon or the state of Washington. It would only be binding the parties before the court, and that would be the United States and these defendants. If the states of Washington and Ore-

gon afterwards desired to litigate it would probably bring whatever suit it thought proper. And I am under the impression, gentlemen, that this question of jurisdiction is a very serious one, where you have to determine between the two states and the United States government the ownership of this property. It is [99] true the boundary might be said to be involved, but that divests jurisdiction; where is this property, in Oregon, this side of the boundary line, or in Washington?

I am under the impression, gentlemen, that these petitions of intervention should not be allowed, but the case should proceed between the original parties, and you will have to determine hereafter the interests of these states in the proper forum. So you may proceed.

There is a motion to set aside the order allowing the state of Washington to intervene. Is that subject to objection?

Mr. HICKS: Yes."

It was thereupon stipulated between counsel for the plaintiff and the defendants that any affirmative allegations or matter pleaded in the answer to the amended complaint should be deemed denied and that the said answer to the amended complaint should stand as the answer to the second amended complaint which was filed just before the trial.

Thereupon Mr. Devers, Assistant Attorney General of the State of Oregon, made application to the court as follows:

“I want to present another matter to the court on behalf of the State of Oregon, at this time: That is in a case pending where this same sort of a question was raised, the Attorney General of the United States applied for leave to participate in the trial to examine witnesses and to allow them to present an argument to the court, with the understanding that the government [100] was not a party to the case, or would not be bound by the decree. And in behalf of the State of Oregon I make application that a like privilege be extended to the State of Oregon in this proceeding.”

Thereupon Mr. Downey, Assistant Attorney General of the State of Washington, made a similar application, in behalf of the State of Washington, in this language:

“Mr. DOWNEY: I make the same application on behalf of the State of Washington, and speaking on that, I know enough about this case to know that this court cannot possibly determine this matter without passing upon the question of whether the land is in Washington or in Oregon.”

The court denied the application of the State of Washington and of the State of Oregon, and, in connection therewith, delivered the following oral opinion:

“COURT: Of course if the evidence shows this land is situated in the State of Washington,

then it is a question of jurisdiction, and the court declines jurisdiction. The court has authority upon its own motion to refuse jurisdiction. I don't think it is required for the counsel to call the court's attention to jurisdiction between the original parties, because that is a matter it is the duty of the court to take care of in the proceedings." [101]

* * * * *

"That is a peculiar proceeding to me. I understand that has been permitted to be done in instances, but a peculiar proceeding to allow outside parties, not a party to the action, to come into the proceeding and participate in it and question the witnesses, and not be bound by it—just going fishing, that is what they are going. This action should be tried between the original parties. I doubt whether anyone else can come in here and interfere and raise issues and examine witnesses; it would just be an expedition trying to find out something. I am not inclined to allow that kind of a procedure, gentlemen. It would be hard on the litigants, the original parties. They have no pleadings from the parties who want to come in and examine the witnesses; they ought to have an opportunity to know what is going on. I am not inclined to adopt that kind of procedure. I think we will have to try this case between the original parties before the court. You may proceed."

Thereupon counsel for plaintiff stated:

“Mr. HICKS: May it please the court, I have here a series of maps which purport to trace the history of Sand Island from early days down to the present time. This particular exhibit places the island and the sands attached to it, adjacent sands, Peacock Spit, and the entire matter, up until 1934.” [102]

Said maps were received in evidence and marked Exhibit 1. It is not practicable to make copies and the originals will be transmitted to the Circuit Court of Appeals together with two additional duplicates for the convenience of the members of the court. The exhibit consists of maps of the waters of the lower Columbia River and vicinity, compiled under the direction of the United States Engineers or the Coast Geodetic Survey for the years 1854, 1870, 1876, 1879, 1880, 1881, 1883, 1885, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933 and 1934.

Thereupon counsel for plaintiff offered in evidence a summary purporting to show the leases made by the United States on Sand Island, or parts thereof, between June 30, 1880 and May 1st, 1930, the annual rentals received and the total rentals received, and said statement was received in evidence as Exhibit 2, without objection but with the

statement by counsel for defendants that it must be understood that the statement does not show the rental on individual sites, or the annual rental received on any particular site, but merely the gross rentals received from all tenants for a given year. Said Exhibit is as follows:

GOVERNMENT'S EXHIBIT 2

“Leases made with respect to Sand Island from and between the 30th day of June, 1880, and the 1st of May, 1930:

No.		Term (Years)	From	Annual Rental	Total Received
1	J. W. and V. Cook	1	June 30, 1880	\$ 509	\$ 509
2	T. A. O. Stensland	3	June 1, 1905	1,920*	4,800
3	Howard Winter	3	do	1,500*	3,750
4	Walter L. Pulliam	3	do	1,000*	2,500
5	Hansen and Olsen	3	do	750*	1,875
6	Cris Hansen	3	May 1, 1908	150	450
7	Columbia River Packers' Assn.	3	do	5,175	15,525
8	John Service	3	do	1,450	4,350
[103]					
9	Alex Muller	3	May 1, 1911	86	238
10	Booth Fisheries Co.	3	do	210	630
11 ⁹	Columbia R. Packers' Assn.	3	do	12,509	37,527
12	do	1	May 1, 1914	6,918	6,918
13	W. E. Tallant	1	do	8,380	8,380
14	Stuart Davis	1	do	281	281
15	do	1	May 1, 1915	11,474	11,474
16	W. E. Tallant	1	do	1,750	1,750
17	Columbia R. Packers' Assn.	1	do	650	650
18	Tallant-Grant Packing Co.	3	May 1, 1916	2,135	6,405
19	Columbia River Packers' Assn.	3	do	14,154	42,462
20	Stuart Davis	3	do	675	2,025

*Revoked Dec. 10, 1907.

No.		Term (Years)	From		Annual Rental	Total Received
21	Sanborn-Cutting Co.	3	May	1, 1919	4,153	12,459
22	W. E. Tallant	3	do		5,000	15,000
23	Columbia R. Packers' Assn.	3	do		9,256	27,768
24	Bankers' Discount Corp.	3	May	1, 1922	1,149	3,447
25	Sanborn-Cutting Co.	3	do		14,010	42,030
26	Columbia R. Packers' Assn.	3	do		6,680	20,040
27	Barbey Packing Co.	3	do		5,444	16,332
28	do	3	do		6,789	20,367
29	do	3	May	1, 1925	46,000	46,000
30	do		May	1, 1925		
			to May	1, 1930	46,000	"

Thereupon counsel for the government offered, and there was received in evidence, lease executed by the Secretary of War, as lessor, on March 27th, 1930, and by Barbey Packing Company and Columbia River Packers' Association, as lessees, on April 21, 1930, to which counsel for the defendants objected that the same was incompetent and immaterial to any issue in the case. The objection was overruled and the lease admitted and marked Exhibit 3.

The material provisions of said lease are:

(a) That the Secretary of War leases to the lessees above named pursuant to the Act of Congress approved July 28, 1892 (27 Stat. 321), for a rental of \$37,175.00 per annum, for a period of five years beginning May 1, 1930, land on the south side of Sand Island, described as:

“All of that certain premises on the south shore of Sand Island, together with rights, easements and appurtenances thereunto belonging, known as Sites Nos. 1, 2, 3, 4 and 5, the northernmost boundary being marked by a line running due west from U. S. Monument No. 4 to the intersection with the low water line; the easterly boundary is marked by a line running due south through Station “Island” to low water near the east end of Sand Island. Length of shore line approximately 18000 feet, all as [104] shown and described on the attached map which is made a part hereof;”.

(b) That said property was leased for seining purposes only.

(c) That the lease was subject to revocation at the will of the Secretary of War and the uses and occupation of the premises were subject to such rules and regulations as the Commanding Officer at Fort Stevens, Oregon, should from time to time prescribe.

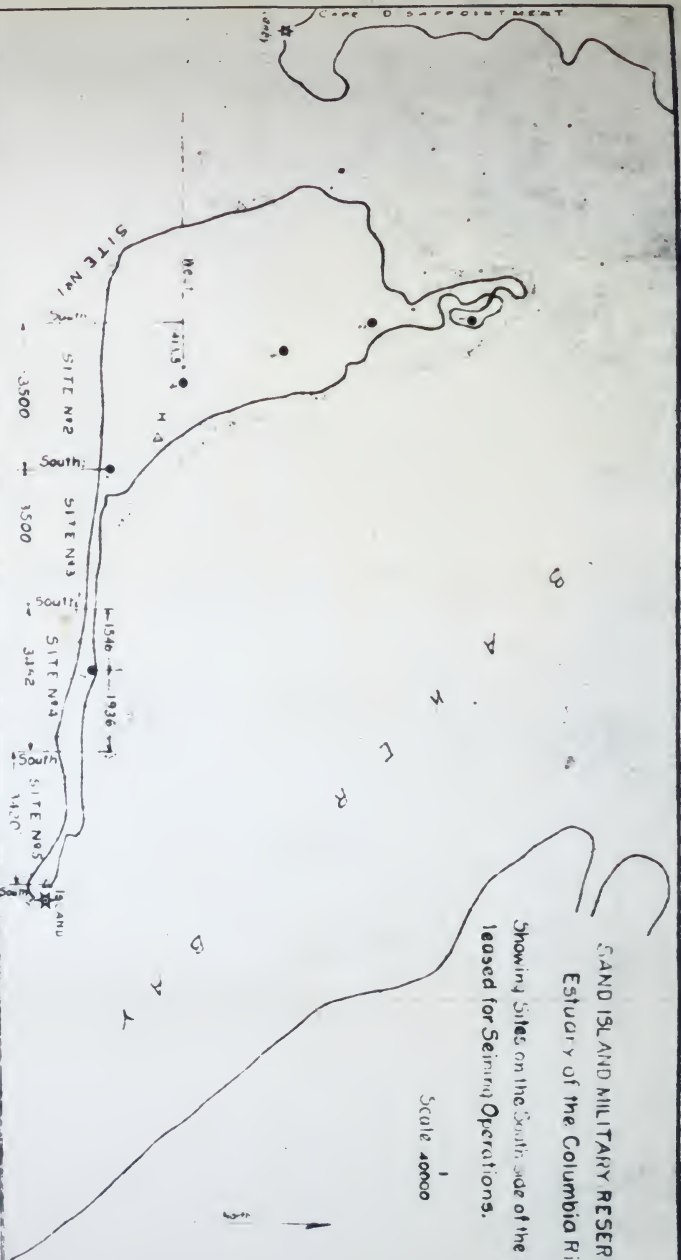
(d) That the rights granted were subject and subordinate to whatever rights, if any, certain Indian tribes had by virtue of the treaties of July 1, 1855 and January 25, 1856, ratified by the United States Senate in 1859.

Attached to said lease was a map or diagram of which the following is a copy: [105]

STAND ISLAND MILITARY RESERVATION. Estuary of the Columbia River.

Showing Sites on the South side of the Island to be
leased for Seining Operations.

Scale 40000



SITE NO. 1

The North boundary is marked by a line drawn due West from U.S. Monument No. 4. The West boundary is marked by a line drawn due East from U.S. Monument No. 3. The East boundary is marked by a line drawn due South from point 1913.3 feet due West of U.S. Monument No. 4 to the intersection with the low water line. The length of shore line approximately 4000 feet.

SITE NO. 2

The West boundary corresponds with the East boundary of Site No. 1. The East boundary is marked by a line drawn due South from U.S. Monument No. 3 to low water line. The length of shore line approximately 3500 feet.

SITE NO. 3

The West boundary corresponds with the East boundary of Site No. 2. The East boundary is marked by a line drawn due South from water from U.S. Monument No. 7. The length of shore line approximately 3500 feet.

SITE NO. 4

The West boundary corresponds with the East boundary of Site No. 3. The East boundary is marked by a line drawn due South from low water from U.S. Monument No. 7. The length of shore line approximately 3500 feet.

SITE NO. 5

The West boundary corresponds with the East boundary of Site No. 4. The East boundary is marked by a line drawn due South through Station Island to low water near East end of Stand Island. The length of shore line approximately 3500 feet.

Thereupon Exhibit 4 was marked for identification, purporting to be a notice or call of the United States for bids on Sand Island for 1934. Said exhibit was not offered or received in evidence.

It was thereupon stipulated between counsel for plaintiff and for defendants:

That the original complaint in this suit was filed August 15, 1934;

That fishing operations under the lease admitted in evidence and marked Exhibit 3, *supra*, were carried on until the 25th of August, 1931, and at no time thereafter;

That, in 1931, for some time prior thereto and at all times thereafter, under the laws of the State of Oregon regulating fishing on the Columbia River and in other waters of the State, fishing operations may be carried on from May 1st to August 25, and from September 10th of each year to March 1 of the succeeding year and that the intervals between the periods stated are what are called "closed seasons" and fishing operations may not lawfully be carried on. The closed seasons are March 1st to May 1st and from August 25th to September 10th of each year. [108]

JOHN H. LEWIS

a witness for complainant, testified:

I am a civil engineer; for a number of years I was with the U. S. Reclamation Service and for 14 years State Engineer of the state of Oregon,

(Testimony of John H. Lewis)

since which time I have been in private practice. I became familiar with Sand Island and adjacent territory in 1908 while acting as State Engineer. I cooperated with the Attorney General in the suit between Oregon and Washington involving the boundary line in the vicinity of this property; later there was a special congressional committee investigating this boundary and I represented the State of Oregon at that hearing, making a number of maps and presenting considerable testimony. I prepared the maps and the particular map adopted by the Supreme Court of the United States in fixing the boundary and I did engineering in this connection. I did this after assembling all available maps of the area from the earliest ones prepared by the United States and interpreted them for the Court, showing the changes in the channel at that time and how the early boundary line moved to the North as Sand Island moved to the North.

Taking government's exhibit 1, I describe the movement of Sand Island from the point of its original location from about 1864 to 1905.

Commencing with the map of 1870 compiled by the Army Engineers as to the location of Sand Island for the years of 1839, 1842, 1852, 1860, 1876, 1878, this composite map shows the constant shifting of the island toward the northward with the island growing larger. On the map of 1905, which shows little change in the general outline of the island, the portion to the west grows westerly for a

(Testimony of John H. Lewis)

while, then it was cut away and moved to the East, and then it will grow westerly again. The 1907 map shows a southerly portion growing westerly and the 1908 map shows the high water line growing westerly as well as the low water line. The same is true [109] on the 1909 map. From 1910 to 1915 conditions were much the same except the 1915 map shows a narrow projection on the southerly tip extending to the West, and beyond these and opposite Peacock Spit are other small sands beginning to show up. On the 1912 map there is no evidence of Peacock Spit but on the 1914 map it was quite prominent. On the 1916 map the projection at the south-westerly part of Sand Island is growing larger. On the 1917 map there appears for the first time a considerable area of sand south of Peacock Spit and west between Sand Island and the north jetty. The 1918 map shows a long narrow spit between Sand Island and Peacock Spit which has disappeared on the 1919 map and Sand Island, with adjoining sands, is becoming larger, and Peacock Spit at the same time is growing very much larger and extending to the eastward. On the 1920 map much of the sand at the southerly portion of Sand Island has washed away with Peacock Spit growing to the eastward. On the 1921 and 1922 maps we have two sands appearing, one at the south of

(Testimony of John H. Lewis)

Sand Island and one at the south and east end of Peacock Spit which were washed away on the 1923 map with no evidence of them on the 1924 map, on which map Peacock Spit has grown still further to the East. On the 1925 map Peacock Spit for the first time has reached an elevation above the highest high water shown by the solid line on the map between the words "Peacock Spit". On the 1926 map is a considerable area of sand below the high water on Sand Island and at the East end of Peacock Spit, which body grows considerably larger on the 1927 map with a small adjoining area. These two islands on the 1928 map have been very much reduced in area with another small body to the northwestward. On the 1929 map Peacock Spit has broken into many different sands. Only two extend above high water and the deepest channel is along close to Sand Island. In 1930 there is a tendency to consolidate the various sands, leaving two channels through the same, one along the westerly edge of Sand Island and the other cutting through close [110] to Cape Disappointment. On the 1931 map the westerly channel close to Cape Disappointment has become larger and the channel next to Sand Island to shoal and become narrow. In 1932 the same tendency continues, the westerly channel next to Cape Disappointment becoming wider and shorter and the channel next to Sand Island more narrow and apparently shoaling. In 1933 the westerly channel has moved slightly to the east and upper end of the channel next to Sand

(Testimony of John H. Lewis)

Island has been entirely closed by sand but is open to the south near the westerly dike then under construction. The 1934 map shows the main north channel has moved a little more to the East and that the channel next to Sand Island is still closed at the northerly end. It is now narrow and opens into a lake at the southwesterly side of Sand Island. While I made a survey of the sands for the State Land Board for the state of Oregon, I never made any survey on any part of Sand Island.

The north ships channel referred to in the decision of the Supreme Court in the case of Washington vs. Oregon is the channel around Sand Island through Bakers Bay. Beginning with the 1908 map this channel and the changes in it may be traced as follows:

On the 1908 map the depth of this channel is not marked but it was shallow. On the 1909 map the entrance to the north channel is much narrower which continues on the 1910 and 1911 maps. It was about the same on the 1912 map with Peacock Spit growing out on the 1913 map. The channel is shown narrower with two sands appearing at the entrance of the channel. The same condition is shown on the 1914 map and 1915, 1916 and 1917 maps conditions were substantially the same with considerable body of sand appearing for the first time south of Peacock Spit and some of it blocking the entrance to this channel. On the 1918 map the channel is narrow and somewhat obstructed, whereas the 1919 map shows a well-defined channel of considerable width

(Testimony of John H. Lewis)

entering Bakers Bay. In 1920 and 1921 there are some sands on each map showing up near the [111] entrance of the north ship channel but not much change in 1922. In 1923 the north ship channel approaches the edge of Sand Island quite closely but is of considerable width. In 1924 the southerly end of the north ships channel becomes narrower and the upper end is blocked somewhat by two large sands which appear on this map. In 1925, 1926, 1927 and 1928 it is approximately the same. On the 1928 map I wish to point out the location written on this map, the words "North Bend", with an arrow leading to a spot on the southerly and westerly side of Peacock Spit, which designates the wreck of the ship "North Bend". On the next map I do not find this wrecked vessel but it is my understanding this vessel, during the winter time, was driven through by the heavy storms which completely broke up Peacock Spit. I find many other channels on the 1929 map besides what is purported to be the largest channel claimed to have been opened by the vessel. These other channels, while perhaps not as wide, were developed by this storm which completely wrecked Peacock Spit at that time, driving some of the sands a little closer to Sand Island. The 1930 map shows a beginning of the tendency to consolidate the area of sands, the north ships channel still being divided into two parts, one going south along the edge of Sand Island and another going almost directly west close to Cape Disappointment. Some of

(Testimony of John H. Lewis)

the sands at the southeasterly portion of this area are not completely consolidated. The 1931 map shows the north ship channel close to Cape Disappointment to be considerably wider and all of the sands have been consolidated and the channel next to Sand Island is growing narrower. The 1932 map shows that the main channel into Bakers Bay, the north ships channel, goes close to Cape Disappointment, and that the channel next to Sand Island is becoming very much narrower and diminishing in importance. The 1933 map shows a well defined north ships channel with soundings upon this map, the other channel close to and adjoining Sand Island being entirely closed at the north end. The 1934 map shows practically [112] with the narrow ships channel moving slightly to the east.

The heavy lines surrounding the words "Sand Island" indicate the highest high tide line where it intersects the edge of the island. On this map there is no part of Peacock Spit shown to be above the highest high tide. This channel around Sand Island is not the main channel of the Columbia River although in the early days it was but at a time when the island was considerably further to the south than at present. The south channel of the Columbia River is navigable for very large ocean going vessels and the north channel for very much smaller vessels. The north channel is not the main channel at the present time but was in the early days when Sand Island was considerably further south than its present location.

(Testimony of John H. Lewis)

Examining government exhibit 5 for identification. I walked over Sand Island last Sunday and observed the conditions of the ground between what is marked "low water 1935" and "high water 1935" west of the westerly jetty sticking out as a black line on the southeasterly edge of Sand Island, and made a general inspection on the ground, and in my opinion this exhibit correctly shows the conditions as I observed them. I recognize government exhibit 6 as the blue print from a tracing I prepared yesterday which shows the general outline of the mainland of Washington and Oregon in the vicinity of Sand Island with Sand Island shown in heavy, solid lines for the year 1894. This map was prepared by tracing from the maps heretofore introduced as government exhibit 1 for the years noted on this map and is intended to show the gradual and continuous shifting of Sand Island to the westward from 1894 to about 1920 with a gradual building up of the high water line of the island during all this period from 1894 to 1920. The channel marked "North Ship Channel 1934" was traced from the 1934 United States Army Engineers map and is intended to show that the 1934 channel comes to about the westerly edge of the meander line. This blue print was introduced and marked government's exhibit 6 but on account of its size it is impractical to insert it or a copy of it into this record. I intended this exhibit to determine whether sands from the west will build up and grow to the east or build up to the

(Testimony of John H. Lewis)

west and to show that as some of the sands are washed away they will be built [113] up by additional sands being deposited when brought down the river during floods and not in general by any sands being washed upstream by the river, although this might occur during heavy, violent storms for short periods.

Cross-Examination

My map, exhibit 6, shows conditions for the years 1894-5 and 1915 and 1920. I selected the years to show the westerly movement of the high water line of Sand Island.

The witness was then asked:

Q. Why didn't you show the easterly movement? Why did you quit just before that began?

A. The easterly edge of Sand Island—

Q. No, I say the easterly movement of the west edge of Sand Island. Why did you quit the maps that would have shown that, why didn't you put that in too?

A. It is apparent from the modern, late maps.

* * * * *

Q. I will ask you this question, Mr. Lewis. Isn't it a fact that the very next map in the series which the Government has introduced as Government's Exhibit 1, will show the opposite action from what you show on the other, and the further maps after that?

A. That was explained by me—

(Testimony of John H. Lewis)

Q. I am not asking for an explanation or an argument. I am just asking isn't that a fact?

A. Beginning with about 1920 this portion of the land, the westerly movement, was washed away by the north channel.

Q. Well, is it or is it not a fact that beginning on maps immediately following the ones you used, this so-called westerly movement ceased, and the west end of Sand Island washed away and receded towards the east?

A. Yes, that is correct.

Q. Why didn't you put that on the map?

A. Because it is apparent from—clearly apparent from the maps; because the movement is not so gradual as in those years, and is easily discernible by looking at those other maps."

I believe that from 1894 to 1905 the westerly movement was 600 to 700 feet, from 1905 to 1915 possibly 400 feet; between 1915 [114] and 1920 just a few hundred feet, making a total, I would judge looking at the map, of 2400 feet or something like that. From 1920 to 1934 the point directly opposite the easterly projection of Cape Disappointment washed away about 500 feet, the recession being very much less than the westerly movement. I consider the place I selected on the west shore of Sand Island is fairly typical of the recession on the entire west shore. The projection on the southwest side of Sand Island shown on the 1928 map appears as scoured off on the 1920 map. The figures at the top and bottom of

(Testimony of John H. Lewis)

the map and on the sides of the map are longitude lines and are on all the maps. If a person would lay a ruler across 124 to the same place on the bottom of the map it would show where that line crosses Sand Island and make an exact comparison possible. It would be easy to lay these lines across a given point on all the maps from which a person could testify accurately as to the movement of the island on the diagonal portion which has been under discussion. On the 1931 map no dikes are shown extending from Sand Island into the Columbia River. We have a wide north channel to the west and a branch thereof to the East close to and adjoining Sand Island. On the 1932 map neither channel shows any soundings, indicating that the engineers felt boats could go in either route.

The witness was then asked:

Q. Upon what authority do you base that statement?

A. Well, it is just my guess, I assume that because the depths are not here.

Q. Don't you think that it would be as safe to assume that it had shoaled to a point where they didn't want boats to assume it was navigable; shoal water?

A. No, because both 1931 and 1932 maps of the government now show a high water line and also a low water line of the various sands and which indicate the channels. The channels then are shown by these sands shown upon the

(Testimony of John H. Lewis)

maps—the channels are marked by these sands, and if there was any preferences I presume the government would indicate on the map.

Q. Don't they show that on every map, the high water line and the low water line?

A. Yes, they do, they indicate that. [115]

Q. There is one then for 1932 and 1932?

A. Except the 1931 map, they show the depth of one channel and not in the other, and on the 1932 map they don't show the depth of either channel. And on the 1933 map they show the depth in the west—most westerly of these divided channels, and at that time the easterly branch of the north channel is completely closed up at the northerly end so it would be useless to put any depths in that channel, because there is no channel.

Q. That is, after these dikes have been in there for a full year or more.

A. There were two channels in 1932, when two dikes were in place. On the 1933 map were still two dikes in place, and in the other two under construction there were beginning to have a slight shoaling or closing of the upper end of the easterly channel.

Q. That was the one chartered in 1931?

A. Yes."

The maps show that at Bakers Bay north of Sand Island there is a meeting place where the tides come in from around the west end of Sand Island and

(Testimony of John H. Lewis)

meet the flow of the river from the east end creating dead water.

The earliest date the name Peacock Spit appears on any map which I have studied is the map of 1880. That map indicated a body of sands in the mouth of the Columbia River close to Cape Disappointment and further out toward the ocean from the present area that is known as Peacock Spit.

The following questions were asked and answers given:

Q. It is very much further out. And that position on the maps indicate that these sands known as Peacock Spit moved inward. Is that true?

A. Judging from the map, I would say that Peacock Spit grew inward instead of moved inward.

Q. Grew inward?

A. Yes, for a time, and then later on almost entirely disappeared.

Q. What year do you refer to?

A. On the 1901 map, I would like to change that; it appears in some years on the map, the words "Peacock Spit"—Peacock Spit is not shown by dots indicating sands but by the printed words, and it would appear that Peacock Spit grew upstream for a time and also downstream for a time, enlarging in nearly every direction. [116]

(Testimony of John H. Lewis)

The 1906 map does not show that Peacock Spit was sounded but the word Peacock Spit is on the map just below the word "breakers" indicating shallow water. The map of 1852 is the first map that I recall having examined in connection with the Sand Island litigation. The earlier maps, I believe, were made by the British Navy. However, my interest in these earlier maps was not to get the very earliest but the best map that was published by the United States just prior to the admission of Oregon which I thought would have been the map used in describing the boundary line of Oregon.

The 1880 map shows a very large area marked "Middle Sands" which are connected to Sand Island and not to Cape Disappointment. The north channel coming out to the north of Middle Sands. The 1880 map also shows Peacock Spit to be south and entirely west of Cape Disappointment about four miles westerly from the present area of Peacock Spit on the 1934 map. After discussing the channel south of Middle Sands and the channel north of Sand Island, the witness was asked:

Q. Now, I want you to listen to my question. I didn't ask about that channel at all. I asked which was being used, the channel north of Middle Sands or the channel north of Middle Sands and around north of Sand Island?

A. I can only answer that question by judgment from the depth of water and width of the channels on the map of 1800 and judging from

(Testimony of John H. Lewis)

those depths and widths I would say the south channel at that time was the most important, but the north channel was straighter and may have been used at that time in preference to the crooked south channel.

Q. What do you mean by north channel?

A. It is the channel north of Middle Sands and going north of Sand Island.

Q. Have you read the engineers' report of 1880?

A. No, sir.

Q. So you don't know that this channel right across here was actually in use, the one right through between the Middle Sands and Sand Island?

Objection was made and the following question was asked. [117]

Q. Do you know whether that is true or not, whether that was the channel in use all along, the one north of Sand Island?

A. Could easily be the case for shallow vessels, but for deeper vessels would have to go either south or north because at that point you described is considerable less depth than in the adjoining north channel and south channel."

I examined this map to determine whether or not the channel in Bakers Bay was not shallower than the channel north of Middle Sands and south of Sand Island and find the shallowest one of each

(Testimony of John H. Lewis)

is fourteen feet east of Sand Island and fifteen feet between Middle Sands and Sand Island.

The witness was then asked:

Q. And yet you testified to the court that the Middle Sands were joined onto Sand Island, according to that map?

A. Yes, they are.

Q. And Sand Island, then, by the same token, is joined onto the north shore of the Columbia River in Washington. Is that right?

A. Sand Island is separated from the north shore by a channel of the depth which I named.

Q. And the Middle Sands are separated from Sand Island by a deeper channel. Is that right?

A. According to this map the Middle Sands are connected to Sand Island by a shoal which has a depth over the top of fifteen feet.

Q. And Sand Island is connected with the Washington shore by a shoal that has a depth of fourteen feet?

A. If you care to put it that way, yes.

Q. Why now are you telling the court that there is a shorter straighter and deeper channel between the Middle Sands and Sand Island than there is between Sand Island and the Washington shore?

A. For vessels of that depth, that is correct.

On the map of 1880 Peacock Spit is shown as a separate entity from Sand Island, cut off but what I term the north ship's channel. The channel be-

(Testimony of John H. Lewis)

tween Peacock Spit and Sand Island is much deeper than is the same channel at the east end of Sand Island or the channel between the Middle Sands and Sand Island. This map also shows Peacock Spit to be located against Cape Disappointment. On my [118] visit to Sand Island on Sunday preceding the giving of my testimony I was from two to three hours on and in the vicinity of Sand Island. Previous to this visit I was there in 1908 during the litigation between Oregon and Washington at which time I spent a few hours. I was there on a fishing trip when I was stranded and learned something about the shoals around the edge of Sand Island. This was about 1918. These were about all the times I was there. There are six or seven government monuments but I was unable to find any of them. I have never claimed that the body of sand connected with Cape Disappointment was a part of Sand Island. The lake I spoke of on direct examination along the west end of Sand Island was occasioned by the closing of the northern end of this channel. The point on the 1932 map which shows the channel narrower as compared with Sand Island is the very point where the channel is shown closed on the 1933 map. The first dikes along the south side of Sand Island were some 18,000 feet from the south entrance to this channel and were constructed in 1932 and the other two dikes which are nearer to the mouth of the channel were started in 1933.

(Testimony of John H. Lewis)

Interrogated with respect to his direct testimony that he prepared the maps used by the U. S. Supreme Court in deciding the boundary between Oregon and Washington, the witness testified:

Q. Mr. Lewis, you said that you prepared the map that the United States Supreme Court used in deciding the boundary line between Oregon and Washington. Is that what you testified?

A. Yes.

Q. Well, I hand you Volume 211, U. S. Supreme Court Reports, and show you pages 132 and the succeeding pages, and ask you which one of those you prepared.

A. The map on Page—the colored map opposite Page 132, is one of the Army Engineers maps, but Chart A, 1851, and the colorings shown here, is the same as the coloring and legend on the map which I prepared and submitted in that case. There was no change in the map except the coloring to indicate the depth of the water and the darker coloring being land, in order to emphasize the north channel, the south channel, and the middle channel; and the map of Page 132 is similiar to a map which I prepared to show the shifting islands, and I believe at least similar to the ones which I prepared. [119]

Q. Now the map opposite page 132 is credited to “Mouth of Columbia River from a preliminary survey under the direction of A. D. Bach,

(Testimony of John H. Lewis)

Superintendent of the survey of the coast of the United States by the hydrographic party under the command of W. D. McArthur, Lt. U. S. N., and Asst. U. S. Coast Survey W. A. Bartlett, Ltd. U. S. N., Assistant. Published in 1881." Now that is the legend on the map.

A. Yes, sir. And my desire at that time was to have—place on here nothing new except the coloring to emphasize the channel so that the court would know was based upon official survey of that particular time and date, the coloring merely being put on to emphasize the channel.

Q. Then what you did was to take their map and color it?

A. Yes.

Q. What was it you said you had to do with the other map?

A. I recall having prepared a map showing the shifting of Sand Island to the northward, and this other map looks like it might have been traced, or may have been the one which I prepared. I don't just recall whether that is traced from mine, or whether it is the same thing.

Q. Do you know Mr. George Hegardt?

A. Yes.

Q. Who was he?

A. He was for a time in charge of the docks of the city of Portland.

(Testimony of John H. Lewis)

Q. What was he at the time this government case, this case between Oregon and Washington?

A. He was one of the engineers employed by the State of Washington?

Q. And what preliminary experience has he had—did he have to qualify him if he had any special qualifications for making the maps in connection with the controversy then before the court?

A. I feel quite sure he was a qualified engineer: I don't just recall his particular qualifications.

Q. Now I call your attention to Page 210 of Volume 214, United States Supreme Court Reports, which is the decision of the Supreme Court on rehearing of this case, in which it is said "As to the channel south of Desdemona Sands, shown on Washington Exhibit 'H' there never has been a time from 1859 down to the present day, when that channel has not been the main channel of the river at that point, the channel which commerce has followed. Both Jussen and Hegardt, accomplished engineers, prepared test maps which were accurate reproductions of the several maps issued by the government, commencing with that of 1851," etc. Was that Mr. George Hegardt referred to there?

A. I presume it was.

Q. And you say he was working for the State of Washington? [120]

A. Yes.

(Testimony of John H. Lewis)

Q. He had been a government engineer, though, for years down there, hadn't he?

A. For some time, I think.

Q. Now I want to show you one of these maps in here, Mr. Lewis. I wish you would look at the map for 1870 being a part of Exhibit 1, and tell the court if that isn't a government map, which shows the change in Sand Island from the government maps and for the period covered exactly like the map on page 132, volume 211, United States Supreme Court Reports?

A. It is somewhat similar, although not exactly the same.

Q. Where it shows for the same years, it is identical?

A. Of course.

Q. Yes.

A. Yes it is.

Q. So the government had maps of their own?

A. Yes.

Q. Showing these various locations of Sand Island, and they are identical for the years covered with what is shown on Supreme Court Report?

A. Yes.

Q. Now are you prepared to say you prepared this map yourself?

A. Now, I am not; I prepared a map somewhat similar to that which was introduced in testimony." [121]

(Testimony of John H. Lewis)

On Redirect Examination,
the witness testified:

The channel between Sand Island and Peacock Spit adjoining Sand Island on the southwesterly side thereof as shown on the 1929 map is wider and deeper than as shown on the 1930 map; and on the 1930 map is wider and deeper than as shown on the 1931 map. And

“Q. And then in 1932 what do you note with reference to that channel as compared with its condition in 1931?

A. The same tendency for shoaling of this channel which existed in the two previous years 1930—or 1929, 1930, and 1931, seems to continue in the 1932 map, and would be no more than you would expect without any jetties having been constructed.

Q. What is the fact as to whether or not the filling up of the channel, or the change in the channel has been gradually and in about the same proportion from year to year from 1929 on down to 1932?

A. Yes, sir. That is the basis for my testimony heretofore.”

The same tendency continues on the 1933 map although on this map there are some jetties and therefore it is impossible to say to what extent the jetties had any influence on the shoaling of this channel. In 1931 the government map shows depths

(Testimony of John H. Lewis)

in the channel southwesterly and adjoining Sand Island but in the 1932 map no depths are shown. But the width, however, at the upper end of the channel adjacent to Sand Island is very much less on the 1932 map than on the 1931. The sand bar across the channel from the southwesterly part of Sand Island is somewhat smaller on the 1931 map than on the 1932 map. The general outline of the sand bar on the 1933 map seems to be slightly smaller although it has extended up stream a little farther than on the 1932 map. The sands of which I am speaking are somewhat smaller on the 1934 map than on the 1933 map due to a tendency of the North Ship Channel to move easterly in 1934 as compared with 1933. These sands as shown on the 1934 map are considerably smaller than as shown on the 1930 map.

When I was down at Sand Island last Sunday I observed what has been called a lake situated in the sands below high water and on the southerly and westerly shore of Sand Island. I was there at [122] about low tide. I estimate the lake to be about 3000 feet long. I do not know how deep this lake was. However it had considerable more depth than at the outlet into the main channel. The outlet was about 40 feet wide leading from the lake in a southwesterly direction to connect with the main channel of the river and the water was flowing out at the time we were there.

“Referring now to the map of 1930, I will ask you to compare the size of the sands lying across

(Testimony of John H. Lewis)

what we have called the channel lying immediately south and west—lying along the southerly and westerly shore of Sand Island—the size of the sands as of that date with the size of the sands noted on the map of 1934.

A. The sand bar you mentioned on the 1934 map was very much—is considerably smaller than on the 1930 map, although the shapes are somewhat different and it is impossible from just a visual observation to say the percentage. I would roughly say it was forty per cent smaller, as a rough figure.

Referring to the map of 1880, which is a part of plaintiff's exhibit 1, it will be noted that there is a body of sands on the southerly and westerly shore of Sand Island projecting in a southerly direction. Soundings are indicated on this map and contour lines on the bottom of the river at various depths. There are some soundings on the dotted or sand spit area. There are some soundings on the outer edge of these sands indicating a depth of about 12 feet. These soundings as shown on the 1880 map are about the same location as the sands south and west of Sand Island shown on the 1934 map. I observe that no soundings are noted for this area on the 1934 map and this would indicate that there are sands adjacent to what I assume to be the high water line shown in solid on this map as the boundary of Sand Island. The absence of soundings would not indicate the depth of water as Army Engineers are more

(Testimony of John H. Lewis)

concerned in the depth of a channel and not so much in the depth of a river used for fishing purposes. On the 1928 map there are three little bodies of sand shown on the southwesterly side of Sand Island in the North channel. This map shows Peacock Spit to be a long, narrow body, above high water, with a small adjacent area between high and low water. [123]

Recross Examination

Referring to the 1928 map, what I have referred to as the North Ship Channel is the channel around to the north of Sand Island into Baker's Bay. On this map the engineers have put their soundings right up along Sand Island. That would be the indicated navigable channel. It does not indicate though that it is not just the same at other points.

Witness was asked with regard to the co-ordinant X8S on the maps, and stated they were definite location points. Taking the X nearest to the Southwesterly end of Peacock Spit on the 1928 map, it is practically at the East edge of Peacock Spit, and on the 1929 map it extends beyond this line Eastward, about 1000 feet, which would bring this extension of Peacock Spit South of Sand Island. The area between high and low water on the Westerly shore of Sand Island is narrow, whereas the area between high and low water on Peacock Spit is broader. The 1931 map shows its channel immediately along the Southwesterly side of Sand Island.

“Q. Now take this point you have been using here, and tell the court to what extent those

(Testimony of John H. Lewis)

sands have built out to the eastward which would make them south of Sand Island and on the Columbia River side of this main ship channel.

A. On the 1931 map the high water portion—the portion of those sands above high water has been entirely washed away and the balance of the sands consolidated, in an area about the same roughly, and perhaps a little bit less than the area shown on the 1930 map.

Q. Will you just measure and tell the court how far it is from the center of these X's up to the easterly point of these sands that have been building out from Peacock Spit?

A. From that X shown on the 1931 map, to the most easterly edge of the sands southwesterly from Sand Island, is approximately five thousand feet as scaled upon this map.

Q. Almost a mile from that given starting point?

A. Yes. [124]

Q. During that period to what extent did the sands build out from Sand Island?

A. A small amount, probably about two hundred and fifty feet as scaled from this map.

Q. It is so small that it is impossible to accurately measure it with the instruments you have, is it, Mr. Lewis?

A. Well, it has apparently increased to some extent.

(Testimony of John H. Lewis)

Q. That is obvious to some extent, but the increase is comparatively negligible?

A. Roughly what I have indicated.

Q. This last map, the last survey made before the construction of any of those dikes out from Sand Island?

A. Yes."

"Mr. Lewis, will you take a ruler and lay it from this point we have been discussing across the next one due east of it, across the next one due east of it, across the margin of Sand Island, and tell the court whether during this period from 1928 to 1932 the west shore of Sand Island opposite a point where these sands are, did not actually recede eastward instead of going westward? That is rather close computing. Did you use these to get your figures?

A. This is the one you ask about?

Q. 1928 to 1931 or 1932, whenever the possible effect of the dikes.

A. In measuring from the most westerly two points you mention to the nearest shore of Sand Island, with the compass, on the 1928 map, and placing the same compass upon the 1929 map, I find practically no change in the west shore of Sand Island. And on the 1930 map, using the same compass, I find practically no change. On the 1931 map I find that the edge of Sand Island has moved probably two hundred feet east; the west shore of Sand Island has moved approximately two hundred feet east.

(Testimony of John H. Lewis)

Q. That is the same time and the same map that you said these sands to the west had moved east about an aggregate during this period, as I remember, of about five thousand feet. *It* that the map?

A. Where it shows that they had extended that far?

Q. Yes.

A. On the 1932 map I find the west shore of Sand Island has moved back to approximately the same point as on the 1928 map.

Q. I only asked you the period of 1928 up to the time when the effect of the dikes would be apparent, if there was any effect.

A. Yes. [125]

Q. 1931 was the last year before the dikes were built?

A. Yes.

Q. 1932 was the first year when the dikes were built?

A. Yes."

Redirect Examination

"Now take your compass and refer to the edge of the island that you have just been mentioning, and note if there was any change in that line after the dikes were built. If there is a change, note what it is.

A. On the 1932 map, which is the first map on which the two dikes appear as having been constructed, the shore of Sand Island measured

(Testimony of John H. Lewis)

from the most westerly of the two points heretofore mentioned, is practically the same distance from this point on the 1934 map, but on the 1933 map it has been built out probably three hundred feet.

Q. In what direction?

A. In a westerly direction, and washed away again in 1934.

Q. And what is the condition in 1934, with respect to that same line that you are defining?

A. Well it is the same as 1932, as heretofore testified.

Q. And compare the 1934 line with that found in 1931 prior to the construction of the dikes?

A. In 1934 the shore line, measuring from the same point, is a little further west, a very trifling distance than on the 19— than on the 1931 map.

Q. Now using the same mark, I will ask you to examine the map as of the year 1928, and note any progress made by the sands on what is termed on the map as "Peacock Spit" towards Sand Island northward?

A. Measuring from the cross near the end of Peacock Spit as shown on the 1928 map, south to the edge of the sands, as shown on that map, and comparing it with the same measurements on the 1929 map, we find them approximately the same."

"Q. Using that mark again as a base, I will ask you to trace the progress of the movement,

(Testimony of John H. Lewis)

if any, of these sands, from 1929 to 1931, the movements of the sands towards Sand Island and in a northerly and easterly direction.

A. In a northerly direction on the 1930 map the southerly boundary line of the sands has moved northward about four hundred feet.

* * *

“A. On the 1931 map we found the southerly boundary line of the sands has moved south again, although not quite as far as on the 1929 map; and on the 1932 map we find such southerly boundary line has moved about six hundred feet northward on the 1932 map. This mark—the date is September, 1932, to be more specific, and on the 1933 [126] map such southerly boundary line has moved southward again several hundred feet, and on the 1934 map it has moved northward again a little further, or about the same point as the 1932 map. Now as to the east and west movement, I think I have testified generally in my former testimony, but I will take the compass now and make exact measurements, beginning —

Q. Unless Mr. Bowerman wants that, I was simply interested in showing the northerly progress of the sands towards Sand Island prior to the construction of the dikes, so you need not mark such calculation unless Mr. Bowerman wishes it.

Mr. BOWERMAN: May I suggest that what you have shown is the southerly extremity of

(Testimony of John H. Lewis)

these sands on the side of the sands away from Sand Island, not away from this point and Sand Island.

Mr. HICKS: I submit for your information that that other calculation was made in my prior examination, to show the gradual progress of these same sands we have been talking about towards the edge of Sand Island in a northerly direction. That has all been covered in the testimony. [127]

H. K. PARKER,

A Witness for the plaintiff, testified:

My home is in Astoria, and I have lived in that vicinity for about forty-five years. My occupation is that of seining foreman. I have been engaged in seining and fishing activities for about thirty-one years. During that period I have gained some familiarity of Sand Island, Peacock Spit and the adjacent premises. I was in the Navy in 1917-18. I have been engaged in fishing operations during the past two or three years. I worked several miles about Sand Island during that time, but have been near the island several times. I have not engaged in fishing on Sand Island since 1929.

I am familiar with the method of fishing known as seine fishing. Drag seines vary in length. Those used on Sand Island most of the time were about 220 fathoms long, six feet to the fathom. A drag

(Testimony of H. K. Parker.)

seine is a web that is hung between a lead line on the bottom and a cork line on the top. The cork line floats and the web is suspended or hung between the lines, fastened on the lines. The nets vary in width. You cut the web to float to the bottom and the top on the surface. When operating one end is fastened to the shore and the net is let out in a semi-circle so as to drift with the tide. When the drift is made you pull in with a team, gradually sweep the net in from both ends until you have your fish corralled in a small spot and rolled up on the sand. The free end of the net is taken out into the water on a seining skiff, which is a flat bottom boat about 28 to 32 feet in length and is towed out with a power launch. As the net is brought in and around towards the shore the fish is collected and when rolled up on the sand are handled by hand. This type of operation is [128] carried on on the flood tide on Sand Island. The fish when picked up by hand are placed in some kind of a container and hauled away. Usually on Sand Island they were thrown into a wagon, hauled away with a team and loaded on scows or launches.

I have observed the Sand Island premises during the past two or three years. During that time there have been buildings on Sand Island. There were buildings there last year. I am familiar with the maps. Referring to the 1934 map, there was some piling in approximately that position (indicating) in the lagoon, the bank side. I am now referring to

(Testimony of H. K. Parker.)

a point on the easterly edge of the area circumscribed in red on the sands lying immediately South of Sand Island. I have marked the spot where the pilings were as nearly as I can remember with a red dot, which is more to the south of the letter "l" in the word "Island" than to the letter "a" in the word. Only the piling is left there now. There were two frame buildings there in 1934. I was told they washed out since then, but I didn't see them go out. There was a heavy storm last winter but I do not know the extent of the storm. There were no other constructions there in the last two or three years that I know of. There are old buildings still there back of the island on the north side of Sand Island, which is a long way from the point I have just mentioned. The buildings, the location of which I marked on the map, were used in 1934. They were a barn and messhouse, I think. I did not observe any fishing on Sand Island in 1934, but I did in front of Sand Island, but not on the island, when they were fishing. [129]

"Q. When I said Sand Island I meant the sands immediately South, same being the disputed premises.

A. Yes, I saw them.

Q. And over what period of time did you observe fishing activities on these particular sands in the vicinity of this red dot that you have pointed out, and immediately south of the letter "l" and extending on westerly, over last year?

(Testimony of H. K. Parker.)

A. Not over an hour.

Q. You just saw them on one occasion?

A. That is all."

I am familiar in a way with the premises known as Peacock Spit and with the location of what is termed the North ship channel, I know the channel as it changes.

I am familiar with the tides and activities of the stream or estuary of the Columbia river. Frequently there are heavy storms down there. Just how often it is pretty hard to say. In lots of winters we have continuous blows, sometimes a week at a time we have the storm signals up. The tides often go over the scale, I think some winter tides are eleven feet. I have seen tides two and three feet over the scale. There is always a run of winter high tides. Last October we started with the first heavy storm. It was somewhere around October 30, if I remember correctly. We had several hard blows, continuing right along until Spring. We have breakers that break upon the shores of Sand Island and any sands that might be lying in that vicinity. I don't know just what kind of breakers they are, I should judge they go from six to eight feet. They are smaller than ocean breakers. I have known them to go as high as six to eight feet. It is not unusual for breakers to reach an altitude of six or eight feet.

It is a hard thing to say how frequently that vicinity is visited by heavy storms. We don't keep

(Testimony of H. K. Parker.)

track of those [130] things. I know of my own knowledge that before the first of the year we had four hard blows, but after that I didn't pay much attention because I wasn't on the river, but there was at least four hard ones before the first. I haven't been on the lower river much since 1929.

I can't say whether the area lying west of the channel which you pointed out to me, and which angles but is adjacent to Cape Disappointment, in the summer months of 1934 was covered with water. The waves or breakers against the shores of Sand Island and the sands adjacent thereto carry sand. A hard blow will always change the contour. These changes may be perceptible over night, and at other times not so much so. The change might be either a building up or carrying away. In the course of a week, or on some occasions in the course of a day, the contour of Sand Island, and the contour of the fringes of sand which border the island, and of spits, may change to the extent of hundreds of feet. Maybe one blow will make the changes, make a new island or build another one. When I say an island I mean a flat. I am talking about flats. If you have a southwest blow your swell will come in this way (indicating). It will go with the wind, it would approach from the ocean.

Cross Examination of Mr. Parker.

The last time I fished in the lower waters of the Columbia was in 1929. At that time I fished in the

(Testimony of H. K. Parker.)

Fall on site No. 2 on Sand Island, with Mr. Smith. It was a drag seine operation. Mr. Smith was foreman for Mr. Barbey. At that time I remember the Columbia River Packers Association was carrying on drag seine fishing across on Peacock Spit to the west and a little to the north. The drag seine operations [131] of the Columbia River Packers Association at that time were over on the sands somewhat to the west of Site No. 2. Referring to the 1929 map, the fishing operations of the Columbia River Packers Association were over towards the area where the word "spit" is written surrounded by a white circle, and the operations were carried on a little to the east of the white circle. At that time the Columbia River Packers Association had structures, such as a dock, messhouse, barn, etc., on these sands, to house the men and horses. Boats operated by Columbia River Packers Association went to these fishing operations to carry the fish over to the packing house at Astoria. These structures, or particularly the dock, projected over these sands into the channel between these sands and Sand Island, and the boats coming from Astoria to carry supplies in and fish out went down the channel between Sand Island and these sands. The channel was rather close to the shore line of Sand Island in 1929. I was down there in 1930. Have been down there every year, but I couldn't testify anything. In 1929 and prior years there were a number of small craft, such as fish carriers, etc., that ran from the Columbia river into what is called the Bakers Bay area up to Il-

(Testimony of H. K. Parker.)

waco. I don't think they always took the channel between these sands and Sand Island. I think in calm weather—in fact, I am sure, they went through here (indicating.) I don't know anything about the ship called the North Bend. There have been numerous times, I won't state the dates, I don't know the dates, but there have been other channels through before the North Bend was over there. I can't say whether there was any channel through the spit for a period or ten or eleven years before the North Bend cut through [132]

The fishing operations I saw in 1934 were carried on from down here to here, the length of the beach (indicating). That would be south of the lagoon, and the buildings used in connection with these fishing operations were where I have marked with a spot, and that was south of the lagoon. It was across the lagoon. You would have to look across the lagoon to the north and east to see the high water line on Sand Island. The structures used in these fishing operations projected out into the lagoon. There was a bunk house, a messhouse, I should judge, and the dock projected out into the lagoon. The boats reached the dock through the channel between the sands upon which these structures stood and Sand Island, and came into the channel a little to the west of the most westerly dike and then proceeded up to the dock.

“Q. And the dock was built into the land—the dock was built so that it projected eastward and northward into the water?

A. A little north.

(Testimony of H. K. Parker.)

Q. And the dock didn't reach what you call high water mark on Sand Island?

A. No.

Q. In other words, the boats came in that channel along the south shore of Sand Island and tied up to the dock?

A. Yes.

Q. And was plenty of water between that and Sand Island proper, for the dock—the boats to tie up to the dock?

A. Yes.

Q. Load and go out through the same channel?

A. Yes."

These boats were what is called fishing tenders, about sixty feet long, with a beam of about fifteen feet and draft when loaded of $7\frac{1}{2}$. I was only down there once in 1934, and only [133] observed these fishing operations for about an hour, which was in the month of August.

Redirect Examination of Mr. Parker

The pilings built on the spit in 1934-'32, are still there. I could locate them, but only in a general way.

Referring to the map of 1932, I would locate them about here (indicating). I have marked with a small cross a point immediately south of the easterly tip of Cape Disappointment and between the sands just south of Sand Island and such sands as are projecting from Cape Disappointment. That is as near as I can put there by guess, and it is just my best guess.

[134]

LARS BJELLAND,

A witness for plaintiff, testified:

I am the officer in charge of the Coast Guard stationed at Hammond, Oregon. I have occupied that position for thirteen years at two different times. The last time I have been there since June 11, 1929. My general duties are to protect life and property. I am familiar with Sand Island and with the sands adjacent thereto, and have had occasion to observe fishing activities conducted on the sands and on the island over the last three years. These fishing operations were carried on with gill nets and drag seines. I observed drag seine operations in 1932 below the lower dike and in the general vicinity of the area circumscribed in red on the 1934 map. I can't say exactly how long these operations continued, but I should say from the latter part of June until August. I observed drag seine operations on the same premises in 1933 and again in 1934. The drag seine operations I have referred to were carried on in 1932, 1933 and 1934, upon the sands that I have indicated.

I have observed the waves, tides and currents that occur in the estuary of the Columbia river and in the vicinity of these sands and of the island. When we have a heavy storm of course it causes the sea to increase and on flood tides it will increase the sea.

“Q. Describe to the court the character of the storms and tides that you have noticed there.

(Testimony of Lars Bjelland.)

A. Well, if we have a heavy storm of course it causes the sea to increase, and on flood tide it will increase the sea; it will go over the lower part of the island and it also will carry—when it gets rough will stir up the sand and carry sand along as it comes in—in or out—on the flood tides will mostly carry sand in, and on the ebb take it more back again as she goes out; but on the flood, as I say, she will come in and carry sand also with it.” [135]

Every tide covers them. I am speaking of those projecting from Cape Disappointment.

Referring to the sands abutting on Sand Island and those immediately east of the channel running between the sands I have mentioned and sands abutting on Sand Island, during the summer months, when the weather is nice they are not altogether covered, but at times during storms will carry on and in through this lagoon. But during the summer months she will not go clean over to the bank.

“Q. What is the fact as to whether or not during storms even of mild extent the sands abutting from Sand Island to the south are covered practically to the point of the main land?

Mr. CLARK: You are talking now about sands south of the lagoon.

Q. South of the lagoon and abutting from Sand Island, yes.

(Testimony of Lars Bjelland.)

A. The west end here. Really here is too high on the west end here. She covers—goes across here on the outside.

Q. You are referring to—

A. West of the Lagoon.

Q. To the area directly south from the westerly edge of the main land of Sand Island?

A. Yes."

Referring to the sands lying to the south of Sand Island, when a mild storm is in progress I should say that about half of these sands would be covered. I am pointing to the sands which are almost directly south of Sand Island.

During storms of greater extent she would come across here into this lagoon. During the winter months, why, she would break right across here. I would not say here, but from here on and up to there she covers (Indicating).

During a fairly severe storm nearly all of the sands immediately south of Sand Island would be covered, with the [136] exception of the west end.

I have not had occasion to measure the tides which occur there. They would, of course, be taken from the tide tables. I have observed the breakers on Sand Island. They vary in height according to the storm and the direction of the wind. If the wind is from the west they are worse, because that would be straight in from the bar and they would hit the west end, or the southwest end of the island. If the wind was from the southeast the south jetty would,

(Testimony of Lars Bjelland.)

of course, protect some. There are breakers that come in directly from the bar and approach and hit the edge of the island, and the sands south of the mainland, or the low side. These breakers break on Sand Island, not like on the bar, but I should say in stormy weather, oh, eight or ten feet high. I have stated that these storms come between September and April. The heavy storms will vary in number, possibly two or three in a season. A storm would be a wind velocity of thirty miles or more. A storm of about fifty miles an hour would cover the sands immediately south of Sand Island.

“Q. I am not so interested in the velocity, I want to know whether a storm of the kind you have just mentioned, which is not a severe storm, but what you call a storm, if that covers all of those sands, or practically all of them, lying immediately south of Sand Island?

A. Yes, sir.”

During the winter months the tides are rough and would cover these lower spits. I am talking about normal tides in wintertime. These winter tides, providing the sea is rough, would cover all these sands lying immediately south of Sand Island.

I am familiar with the location of some piling on the sands extending south from Cape Disappointment or on [137] the sands across the channel from Cape Disappointment and on the sands south of Sand Island. There is old dock piling there. So far as I know the dock was used for receiving fish. I don't know when the piling was put in. The piling

(Testimony of Lars Bjelland.)

are in the same place where they were originally put in, but the channel has moved. I have observed the location of these piling during the past two years. I do not know whether there was any drag seine fishing on the sands projecting from Cape Disappointment and on the westerly side of the channel between Sand Island and Cape Disappointment.

Cross Examination of Mr. Bjelland

I was at the Grays Harbor station from 1923 to 1929, which is about forty-eight miles north of Astoria. Before going to Grays Harbor in 1923 I was stationed at Hammond for five years. Hammond is on the south side of the Columbia river, in Oregon, about twelve miles west of Astoria, and about one mile east of Fort Stevens. It is about four and one-half miles from Sand Island. There is another life saving station just across the channel from Sand Island at Fort Canby, which is about a mile from Sand Island. I was never stationed at the Fort Canby station. I keep at our station an official record of storms and wind velocities, and also have tables of normal tides. We keep no record of abnormal or extraordinary tides, except what appears in the tide tables. If the tides vary from what might be called normal tides as recorded in the tide tables, there would be no record of such variance or of abnormal or unusual tides. That is, there is no measurement taken of how high the tides were. The official records we keep give the date of a storm, the direction of wind currents and their velocity, and the [138] like. I did not bring any of that with data

(Testimony of Lars Bjelland.)

with me, nor did I bring with me any data concerning the normal tidal movements.

I have gone on to Sand Island in recent years. The last time I was there was about three months ago. I went there for the purpose of furnishing transportation for the United States Engineers who were making a survey of the island. I took them over in a boat and accompanied them on to the island. We covered the island from the east to below what was called the lagoon. That was in March of this year. I went on to the island. I was on the island about six months before that for the same purpose. I would not say when I was on the island before that. We landed there several times during wreck operations, running lines ashore. The wrecks I refer to are assisting fishing boats when they run afoul of dikes or traps. We really assist from ten to fifty boats every season. I am not able to say when I was on Sand Island in the wintertime except in March of this year. I think I was on there in wintertime about a year before that. I could not say whether I was on Sand Island at all last winter, except in March when I took the engineers over. Nor could I say whether I was on Sand Island at all during the preceding winter, nor the winter before that. I am not able to say when the South jetty was either begun or constructed. The South jetty starts near Fort Stephens about a mile east from our station at Hammond. But I do not know when it was begun. There is work still going on. I could not say when the North jetty was built.

(Testimony of Lars Bjelland.)

I located some fishing operations on the sands south of Sand Island on the 1934 map. Assuming this map is drawn to its scale of about a thousand feet to a quarter of [139] an inch, these sands are about 1500 feet south of the high water mark of Sand Island. The seines were being dragged in or landed on the southerly or ocean side of these sands. The structures that were being used in connection with these operations were on the sands, and probably at least a thousand feet away from the white line marking the south point of Sand Island, of the high water mark, and these structures consisted of a messhouse, bunkhouse, accommodations for horses, etc. The dock which served these operations was built out on these sands and projected northward toward Sand Island. The boats which came in there to serve these operations came into the channel between these sands and Sand Island.

I spoke of some piling. This piling is considerable to the west of where the fishing operations were being carried on in 1934. The old piling may have been driven some years ago and was used in connection with securing their barges.

“Q. Do you remember, as a matter of local history down there, that as these sands shoaled up and pushed towards Sand Island that dock which was inshore between the sands and the island, got sanded up?

A. Yes.”

(Testimony of Lars Bjelland.)

I don't remember how many docks were built, but I do remember there were two or three. I remember when the dikes were constructed along the south shore of Sand Island. The purpose of constructing these dikes was to bring the current farther south. I am unable to say whether the current was moving north and washing away the shores of Sand Island.

Redirect Examination

The data with regard to wind velocity, tides, etc., are available at the station at Hammond. It is available to counsel for defendants by permission of headquarters. It is not available to the government without permission from [140] Washington, D. C. What I testified to with regard to tides, winds and current was within my personal knowledge. I passed up the shores of Sand Island probably every other day from May 1 to August 25. The frequency with which I am in the vicinity of Sand Island varies according to whether we have anything to do in that location. We have occasion to go down there once in a while, possibly as often as once a month, during the wintertime, maybe sometimes oftener. Our work does not carry us on to the island very often. We patrol along the island and most of our patrolling is from the North jetty and up along Sand Island. Our regular route of patrol carries us past and in good view of Sand Island and the shores of the island.

(Testimony of Lars Bjelland.)

Recross Examination

I mentioned from May 1 to August 25; that is the gillnet season. That is the quiet season. There is not many storms during that season, that is very many severe storms. Whenever we go out on any trips in winter that have peculiar relations to my life saving duties a record is made and a log is written up. These logs which I keep would tell just how many trips I made last winter and how many the winter before, where I went on these trips, etc. I have all that data at my station at Hammond.

Redirect Examination

My experience has given me the opportunity to observe the tides and breakers that are common and which may be found during the storms in the estuary of the Columbia River. The breakers vary according to the depth of the water. You take a steep beach and you will only have two breaks in a steep beach. Where you have a shallow beach you have five or six, or maybe eight breaks before she hits the beach. [141] The lower end what I mentioned above as the south end of Sand Island is shallow.

Recross Examination

Breakers are those waves that roll in. They come into the lower Columbia under very much the same conditions that they come in anywhere else. If there is a long, level stretch of sand a wave rolls and rolls and rolls before it spends itself. If it breaks up

(Testimony of Lars Bjelland.)

against abrupt walls it spends itself in one smash. Water does that everywhere, whether in the Lower Columbia or elsewhere. [142]

L. WOODWORTH,

a witness for the plaintiff, testified:

I reside at the Coast Guard Station at Cape Disappointment near Ilwaco, Washington and am the officer in charge. I have been in the Coast Guard Service about 15 years and have been at the Cape Disappointment station for about 21 months. I was there first in 1921 and was transferred away and then came back in 1925 to the Point Adams Station on the Oregon side where I served until 1930 and was then transferred north to Willapa. Point Adams is about four or 5 miles Southeast of Sand Island which is in Clatsop County, Oregon. Cape Disappointment Station where I have been located for the past fifteen months is at Fort Canby on Cape Disappointment, Washington, about 5 miles from Ilwaco. It is about here (pointing to the left of a star where the little white line runs out west on the 1934 map and to the word "Rear" and "R"). There is a lookout station on the top of Cape Disappointment which is marked by a star, on the extreme southerly tip of Cape Disappointment. There is also a lighthouse at the same point. Different men have kept lookout at the lookout station during the past 19 months. I have charge of the station but I don't

(Testimony of L. Woodworth.)

stand watches there. Each man on lookout serves 4 hours and the watch is held continuously throughout the 24 hours of each day. I have charge of the station, visit the lookout each day, may be up there five minutes and may be up there one hour. The lookout is maintained for the purpose of sighting vessels in distress or persons in distress. The lookout also keeps watch of the condition of waves and tides. In the performance of my duty I have at different times observed waves and tides and currents. At different times there are [143] storms, other times calms. I have had occasion to measure the tides. On December 19, 1933, or along about there, we had a big storm and I measured the tide, it was 16 feet. This measurement was taken off the U. S. Engineers Tide Gauge located on No. 3 channel light stake, which is at the asterisk designated as Ilwaco channel "3 FW" situated just north of the easterly portion of Sand Island, and in Baker's Bay. I measured the tide on October 21, 1934, during a storm and it was a 16 foot tide.

In December, 1933, we had a 16 foot tide. The following day I measured, it was a 11 foot tide. This was during a storm that had continued through several days. I have measured the tides there on other occasions but didn't pay much attention unless there was a storm on. Storms are accompanied by large breakers which hit the banks and sands in the vicinity of Sand Island. These breakers have different heights, they are higher when the storms are

(Testimony of L. Woodworth.)

severe. They run from 6 feet to 12 feet. I am now referring to the breakers that break on Sand Island and the sands around Sand Island. I have been on Sand Island from time to time and have observed conditions there. The waves and tides and currents have direct access from the bar to the sands of Sand Island and the sands immediately south thereof. The waves and breakers on the main shore of the ocean are heavier than those that break upon Sand Island and the sands south of Sand Island but I am not able to estimate how much heavier. Sometimes on the outside they are 40 or 50 feet high during severe storms and the highest breakers I have noticed on the shores of Sand Island I would judge to be from 8 to 10 feet, just high enough to go over the boat. The breakers during these severe storms will move the sand around and wash it in or wash it out, or flatten it down. Referring to the sand south of Sand Island, I have seen a sand washed out, and I have seen it washed in over a period of one month. Sometimes it will take a day, and sometimes it will take a week. What I mean by a sand is this whole body of sand between Sand Island west of Cape [144] Disappointment which are all low sands, and the breakers go clear over. In the winter of 1934, when this big storm came up I have seen the breakers go clear over these sands, clear up to Sand Island, the mainland of Sand Island. They would not overflow any part of the mainland of Sand Island. After one of these storms had hit the fringe of sand

(Testimony of L. Woodworth.)

south of Sand Island our channel would change and we would sound to find out where the deep water was. When I say change I mean it would fill in and at times it would be changed as to line and contour and it would alter the low water mark connoting the fringe of sands south of the island there. Some of these sands would move perhaps 100 or 200 or perhaps 300 feet at a time. That is a single storm might move them that much. I was not at the Cape Disappointment Station in 1929. I observed fishing activities south of Sand Island in 1934. I do not know who was fishing there. I am familiar with the piling located on the sands in this general vicinity. The piling locations roughly estimated are about in here (indicating) on the map of 1934. That is right in the middle of the 1935 channel dividing the sands of Cape Disappointment and other sands; this point is south of Sand Island and easterly and southerly from the figure "10" which is in the channel dividing the sands of Cape Disappointment and other sands. The sands south of Cape Disappointment and west of the channel between Sand Island and Cape Disappointment and also the sands south of Sand Island and east of the channel separating Sand Island and Cape Disappointment are covered by water twice a day at flow tide. [145]

They are below high water mark. The high water line I refer to is the white line drawn on the southerly and westerly edge of the area noted as Sand Island towards the area of sands west of the channel and between Sand Island and Cape Disappointment.

(Testimony of L. Woodworth.)

Cross Examination

I went to my present station at Cape Disappointment in November or December, 1933 and I have not been at that Station since 1921. I went to Siuslaw Station, about 200 miles south of Astoria, in 1921. Was retransferred to Point Adams Station in 1925. Point Adams is in Oregon about 12 miles west of Astoria by road and about $41\frac{1}{2}$ miles from Sand Island. I saw fishing operations in 1934 but do not know who were carrying them on except by hearsay. In connection with these fishing operations I saw on the sands where the fishing operations were being carried on permanent structures such as buildings, docks, etc. I do not recall whether I saw them in 1933 as I came back to Point Adams Station in November or December of that year but I did see them during the fishing season of 1934. I never was at the buildings. Probably was within a half or a quarter of a mile of them. I don't know how late in the season of 1934 these fishing operations continued. I don't know whether the operations continued after August 25th. They were drag seine operations and the drag seines were being landed on the [146] south shore of the sands. The structures were up further to the north on the high sands. These high sands where the structures were located would be about 2000 feet south of this white line on the 1934 map that marks the high water line of Sand Island. I am not familiar with the dock which was used in connection with these fishing operations in 1934 and

(Testimony of L. Woodworth.)

I do not know how the fish was handled after the nets were drawn in on the south shore of the sands. I know nothing about the fishing operations there in prior years. The highest tide I mentioned was registered in Baker's Bay, which is a shallow body of water of considerable magnitude north and west of Sand Island. It was in there that I read the highest tide. On flood tide the waters come into this large shallow area between Cape Disappointment and Sand Island and also around the east end of Sand Island. This big shallow area that is north of Sand Island fills up on flood tide around both ends of Sand Island. If the flood tide is aided by prolonged and heavy winds from the ocean there is a tendency to pile up the waters in the area known as Baker's Bay and in the whole lower Columbia. The higher tide is frequently the result of an ordinary tidal movement plus the piling up of water by long continued heavy winds from the ocean. When the Baker's Bay empties on ebb tide the waters whip around both ends of the Island in flowing out but more on the west end than on the east end. The current there doesn't hurt the gillnetters in these because they don't gillnet in there. They haven't gillnetted there since my time.

The storm in October, 1934, that I referred to was [147] an extraordinary storm. It tore out stretches of highway down there in that vicinity on the north side of the river. I don't know whether it tore out docks and ferry slips. I couldn't say how many miles

(Testimony of L. Woodworth.)

of highway were torn out, not many miles. Between McGowan and Ellis Point up the Baker's Bay end. The recording of the wind velocity at that time broke at 110 miles an hour.

Redirect Examination

I don't know just what were the permanent structures located on the sands I spoke of. There was a stable, or some kind of a building. I did not examine to see whether they were permanent in character. They were washed out in the storm of 1934. Other storms were not as heavy as the big storm I spoke of. That was the heaviest storm I had known down there. We have storms down there from September to April, two or three days at a time. They will let up for a while, and start up again. They average about thirty miles. A storm of that kind would cause breakers to form and wash upon the sands and shores of Sand Island and upon the sands south of Sand Island. That kind of a storm would cause breakers of considerable size. Storms of that kind might occur four or five in one month, the next month we might have one may not have any for a month. These storms last an average of about six or eight hours although sometimes one may last two or three days. [148]

Recross Examination

These storms are not new phenomena. They have been sweeping up the Columbia for centuries. I presume. I believe the storms have been worse in this

(Testimony of L. Woodworth.)

vicinity the last few years than in prior years. I have been only there the last nineteen months but I think we have had more storms up and down the Coast the last few years. I have in my office at Point Adams a record of the wind velocity of every storm that has occurred in the last quarter of a century and if I had that data with me I could tell approximately the wind velocity of every such storm for the last 25 years. Point Adams life saving station is the same as the Hammond Station. Mr. Bjelland calls at the Hammond Station and I call at the Point Adams. This data concerned wind velocity and is published from time to time by the Weather Bureau. There is nothing particularly confidential about it. It is available at the office of the U. S. Engineers in Portland. [149]

WAYNE AHO,

a witness for plaintiff, testified:

I live at Ilwaco which is about a mile and a half north of Sand Island, on the Washington side of the river. I am a fisherman and have been engaged in that occupation for about fifteen years. I have trolled some and have been a gillnetter. There are somewhere in the neighborhood of 2000 gillnetters fishing in the Columbia River. I have never done any fishing on Sand Island but I fished along south of Sand Island and have noticed drag seine fishing

(Testimony of Wayne Aho.)

activities for about fifteen years. When fishing with gillnets I have had occasion to go along the shore of Sand Island. Sometimes I have gone so close to the shore that the boat would hit bottom. Perhaps fifty feet away from the sands. I have been close enough at times to talk with the men working on the beach. I have observed fishing on Peacock Spit. I couldn't say exactly the times of it but years back anyway. The last time I saw drag seine fishing, on those sands lying south from Cape Disappointment and west of the channel was last year. The operations were being carried on by the Columbia River Packers Association and Barbey. I am now referring to the sands south of Sand Island. The Columbia River Packers Association and Barbey were not fishing on the sands just south of Cape Cape Disappointment and west of the channel. McGowan was fishing there with drag seines. The sands south of Sand Island were fished during the year 1931. The fishing started in June and ended the 25th of August. It was right from here down (indicating) that the fishing operations were being carried on in 1934 by Columbia River Packers Association and Barbey. I refer to an area here on the sands south of Sand Island. I don't know the distance but I know that they fished there; as far as the sand went down, they fished. This would comprise practically all of the edge of the sands west on the dike leading out into the ocean, and the southerly edge of [150] the sands—the entire length there. I observed some fishing

(Testimony of Wayne Aho.)

activities at these same locations in 1933 by the same parties and carried on about the same period, that is from June until the 25th of August.

I am familiar with the location of some piling on the sands south of Cape Disappointment and Sand Island. I am indicating on the 1934 map the point where these structures were used to receive fish. The point which I locate is a trifle to the west of the intersection of a cross on the 1934 map which is immediately south of the word "Sand", and that cross I think is on every one of these maps. There were two different constructions, piling, driven in the sands. They extend above water at low tide and also high tide. The other structures on that body of sand lying south of Sand Island are piling driven into the sand where there had been seining houses, about midway; that is on the lagoon side; about midway from the west dike or jetty on a straight line to the mark I made before. These piling were put in to receive the fish when they were seining on the spit and are now in the same location as when they were first placed.

I am not able to give you the number of men who were engaged in these fishing operations in 1934. When the run of fish was heavy there would be more men and boats which would be in August. I estimate the number of men at 48 to 50, four skiffs, 12 men to a stiff. These sands southerly and westerly of Sand Island are partly covered by normal tides, not completely covered and they fished and landed their

(Testimony of Wayne Aho.)

seines during high water. Perhaps a half to two-thirds of these sands would be covered by high tide. There was a place on the west end that would not be covered and going to the east there was a strip that would not be covered. I am referring to the condition as it is now. [151]

I have observed storms in the Sand Island section. Sometimes a storm cuts away the sands lying south of Sand Island and sometimes it builds them up. I have seen that. Storms generally flatten them out. Sometimes it cuts big long gaps in them and then piles them up again and cuts some more some place else and flattens the sands. Well one tide will cut away more and flatten the beach out; the heavier the seas the more she is going to cut. I have seen a body of sand washed away in the course of a short period of time. This is true of sands lying south of Sand Island. I noticed one year and it was the year the North Bend came through, all the sand came off the boy in a few tides and filled half the bay up. I have noticed changes in the shore line of that sand on other occasions. Once in a while the sands will cut in closer and move out again and shift about. A long spit will show up, and the next tide cover up and won't show up again. Once in a while we will have a channel going down below there; perhaps have two feet of water in it; the next tide will be three or four feet; and go down two or three days afterwards and won't be no water there at all; it just shifts back and forth. At such times the sands

(Testimony of Wayne Aho.)

become cut up and flatten out, and sometimes sands filled in. Not over substantial areas, just over small areas. We run out with our boats and dodge sand bars and go around them. Small peaks show up, shallow places, the channel cuts in different angles. There are times when sands will wash away by such storms. [152]

Cross Examination

My home is at Ilwaco and I mostly use the North Ship Channel in going out to the Columbia River to lay out my nets, I mean by this southerly and southwesterly of Sand Island. I have been using that channel for about 15 years. Sometimes we would not use it because it was too rough. I am not using the channel that the North Bend cut through. I am using the channel right southwest of Sand Island, the old ship channel, they call it. It is not where the North Bend came through, the North Bend came through about one half or one mile away. According to my recollection there was never any channel where the North Bend came through. There was a deep place there, and then it filled up. There is a flat there now and high water covers the whole thing. There never was a channel where the North Bend went through that boats used. In gillnetting I usually drift up past Peacock Spit, Sand Island, up as far as Point Ellis, sometimes in Baker's Bay. Port Ellis is about 7 miles up the river from Sand Island. I sometimes lay out as far up the river as far east as Point Ellis, and then back down the river with

(Testimony of Wayne Aho.)

the current and ebb tide. We drift down as far as the end of the north jetty. Sometimes we drift back with flow tide. The last few days I have drifted close to the southerly side of Sand Island and have done so since the dikes were put in. There are three or four dikes built out at right angles from the southerly shore of Sand Island ranging from 1500 to 2000 feet in length. When I drift along Sand Island I drift out beyond the end of these dikes. I do not drift inside the dike. I lay out the nets below or westerly of the lowest or most westerly dike. I have seen other fellows drifting in there but since these [153] dikes were built my drift has always been out beyond. Above and below the dikes we drift next to the beach. I lay out beyond and southerly of the sands and once in a while on high water our nets go over the sands, not completely over but over in the lower point once in a while. Generally, I lay out below and southerly of the sands. I have been on these sands when fishing operations were carried on in 1933 and 1934. The drag seine operations I am talking about were carried on southerly of the lagoon. We clear away the drift so that we can fish high water on Sand Island. The only drift that has been cleared away was what the engineers cleared away when I worked for them and they cleared it away for a railroad track over which they carry rocks for the dikes. Referring to the heavy white line along the southerly boundary of Sand Island, and this area west of the dike, there has not been

(Testimony of Wayne Aho.)

any drag seines, to my knowledge, landed on that for many years that I know of. The white line is in the middle of the island. I may be mistaken as to that. The drag seine operations that I referred to in 1933 and 1934 were carried on west of the western dike. The sands didn't reach out beyond the most southerly extremity of the dikes but the seines did. The seines were landed on sands that were directly west of and below the dike. There were some structures to the north about the middle of the sand, of Sand Island. The messhouses were along here (indicating). These structures were all southerly of the white line on the map which has been said marks the southern boundary of Sand Island. The messhouse and structures and dock were all considerably south of that white line and south of the lagoon. The boats which brought in the supplies and carried out fish reached the dock from below the western dike. [154]

They couldn't get in with big boats, it was too shallow, and they put a skiff and small boats in that low water. In 1934 they had a small cut or channel in there that they went in as far as the pilings and they had a scow and they would haul out with the scow and the launch would pull them away. They approached the dock on water which was between the sands and this white line of the Sand Island in 1934. There are three different places where there was piling. The one furtherest west was a place

(Testimony of Wayne Aho.)

where fish was received. It was not abandoned. Peacock Spit use to be outside of that pile, and the channel use to run inside of the Spit and they received their fish on that dock on Peacock Spit. The dock is on the outside of Sand Island now. I couldn't know whether they built another dock further east and south or it was a mess house but they a scow to receive the fish.

Redirect Examination.

Questions by Mr. Hicks:

Mr. Aho, you mentioned the manner in which the fish were taken from the sands and conducted away from the island, placed in some boats. Now I wish you to define that matter more clearly. Did the boats proceed up the middle channel between the sands separating that Sand Island the mainland? Did the boats go up there, or were they barges or tugs, or just what were they?

Mr. CLARK: What year?

A. In the year 1932—no. 1933, beg pardon, they brought in scows, flat bottomed scows. They hauled their fish over on the top of the island with wagons, and loaded them on these scows and towed the scows out, and the big boats took them to Astoria." [155]

When I say they hauled the fish over the Island I mean Sand Island. I do not refer to the mainland above high water, but to the low water mark. I am referring to the sands below the lagoon. That was in 1933. There was piling driven on the inside of the

(Testimony of Wayne Aho.)

lagoon next to the high line where they had a scow, and where the men lived, bunkhouse and messhouse. The bunkhouse and messhouse was on the scow. The only constructions on the mainland there north of the lagoon, the little channel, consisted of six or seven pilings driven there. I have seen the men connected with these operations go out on the mainland. I have seen them walking over the island, when fishing; when they would go to Ilwaco and come back and walk over the island. I have not seen them in 1934. You can't carry on fishing operations on dry land, with nets. They go out in the water, and the only water that can be fished is south of the island. I am now referring to this area lying westerly of this dike mark, which is apparently indicated by the figure "14", which is south and near the mid-portion of what is styled Sand Island. The sands lying off the shore of Sand Island, the southerly shore, and east of the dike could not be fished because they are behind the dikes. They have never been fished since the dikes were put in. It is not practical to fish the little lagoon. Fishing operations have to be out on the outer fringe of sands.

Recross Examination.

I may have said yesterday that other gillnetters drifted along Sand Island inside the dikes. I never did. If I said that I probably was mistaken. The other fishermen didn't lay in there, the tide carries them in. They lay outside. I do say that the only time I saw gillnetters between those dikes was when the tide carried them in there against their will. [156]

(Testimony of Wayne Aho.)

Redirect Examination of Mr. Aho.

This morning I was talking of drag seines. I did not refer to gillnets this morning. I have never seen drag seines operate there since the jetties were put in, inside between the jetties, but I have seen them operate before the jetties were put there. Both kinds of operations are carried on there, gillnetting and also seining below the westerly dike. Gillnetting is the operation that is carried on in the water from boats. We don't use sands. Our nets are in boats and we lay out in boats and pick up in boats; we don't go ashore. The fishing operations that were conducted in 1932 were on the same sands as in 1934. [157]

C. R. GLASGOW

As a witness for petitioner, testified:

I am employed by the U. S. Engineers Department, as survey man, Supervisor of survey parties on the lower Columbia River, and have been on survey parties a little over twelve years.

I identify plaintiff's exhibit 5 for identification, as a map of the 1935 survey of high and low water of the Sands near the mouth of the Columbia. I prepared a portion of it and the rest of it was prepared under my direction. This is an actual copy of a map we are going to turn in,—I assisted in making the survey, and while on the ground I directed the survey from which this map is made. I did part of it

[Testimony of C. R. Glasgow.]

myself and the remainder was made by three other members of my party, working in conjunction, under my supervision. The map correctly delineates and defines the map and section it purports to define. We did not use any surveyor's chain. In hydrographic surveying, the locations are made from what we call three-point locations, with an accuracy of less than 1% of error, according to the scale of the map.

This map was admitted in evidence, but owing to its large size, it is impracticable to include a copy herein.

On Cross Examination,

witness testified:

Exhibit 5 is a tracing and copy of the original survey now in our office, from which maps are printed, but none are now printed and available. The map, as a whole, is not completed, as it would cover a larger portion at the mouth of the river. This merely covers a little section North of the ships channel. It takes from three to four months to prepare a chart of the mouth of the river, and as we had not completed our season's work, I prepared this partial copy at the request of my superior. The legend "low water 1935" is the usual legend put on maps, or else a characteristic symbol is placed thereon. Witness then was asked: [158]

"Q. Will you look at these recent maps and say whether that is the usual legend?

A. No sir, it is not on any of those maps that I have examined, no sir; except the symbol that is used for it.

[Testimony of C. R. Glasgow.]

Q. What symbol is used?

A. They use a solid heavy line for high water, and a dotted line for sands.

Q. That is what I understood, and I wondered just why you adopted the language "low water 1935", which I had not observed on the maps running back some eighty years, in evidence.

A. Well, I put that on there on my own in order to try to prepare a clear map, that is all."

We did not make soundings in the entire area delineated by the map. I sounded channel lines from the upper end of Sand Island on the East end into Ilwaco, also all portions of the North jetty inside the Columbia River, across from Sand Island to Clatsop Spit not reaching clear to low water, however, a depth which was about 15 to 18 feet deep off shore.

"Q. Take this area that lies to the North-erly side of the dotted line marked "low water 1935" in and around Sand Island and Peacock Spit and over into Bakers Bay, along Cape Disappointment into the bay. Did you make soundings in that area?

A. No sir, not yet.

Q. That channel that is indicated there, there have been no soundings made in that?

A. Not for three months, I made them three months ago.

[Testimony of C. R. Glasgow.]

Q. Well, why didn't you let us have the benefit of those soundings by putting them on this map?

A. Lack of time."

In surveying the low water and high water lines we have beacons located on the shore and we locate the beacons with a sextant, observing the two angles; on measuring two angles we have the location and we record them in a book and try to take all unevenness or inequality in a beach; the coves and peaks, and on a straight beach we take the shoals practically 400 or 500 feet apart [159] on the scaled map, so they show the true shape of the sand; and continue on that way observing two angles with the sextant on three plotted beacons, then I take a record of the map with three protractors. For the low water, the observations are taken when the tide is out, although we do not get it at exactly low tide. We take it on the lowest tide of the month so as to have an average of the zero tide for about the three hours we worked on the work. The average arrived at is a matter of judgment rather than exact calculation as we do not read any gauge or anything during that time, but we know the time we have to be there and work accordingly. For the line marked "high water 1935" the locations are made similar to the low water. After, to get a day's work in, we have to keep working, so we go up on the high water line, which is higher than any recent tide, and locate the shape or contour on the high water line.

[Testimony of C. R. Glasgow.]

The witness identified the "X" marks on the map as co-ordinants in engineer's parlance, and which indicate known positions but are definitely and accurately located on the map. I am familiar with the location of the third dike coming down stream, which is the middle dike, touching Sand Island. The high water lines are laid out on this map by just walking along the shore and taking our sextant and observing the points along the shore.

I worked on the 1932 map (a portion of plaintiff's exhibit 1); the main Sand Island is in two parts, and the portion indicated by a single line is a dike construction where the island had been cut entirely in two; this was an artificial dike a little over 1000 or 1200 feet long, built to bridge over and connect the two parts.

The "5" on my map of 1935 would at a point on the 1934 map (a part of petitioner's exhibit No. 1) be right in between the center (the middle) and lower dike, which would include the area marked with a star and the legend "entrance front" on the 1934 map. Between the dikes on the Columbia River side of Sand [160] Island, the land above high water is filled in, but is not filled in on the Baker's Bay side. I made no measurement of the distance across the island from the high water line on the river side to the high water line on the Baker's Bay side of Sand Island. These lines are run as I described, but the distances between them were not tested as to accuracy by measurement or otherwise, and that is true of the entire map.

[Testimony of C. R. Glasgow.]

The channel into Sand Island had not been sounded for three months prior to the making of this map. From recollection, I would say that the soundings made three months prior to the making of this map would be a maximum 15 feet and a minimum 11½ feet. In making the soundings on the river side, it is our custom to cross the river on a line coming as close to the beach as we dare, and then go down the beach 1,500 feet or so and cross back. We leave an empty space in between, so there are groups of soundings here and there.

The 1932 map shows a body of sand that lies on the river side of Sand Island and is cut off from Sand Island by a channel, and it is also cut off by another channel into Baker's Bay. From the East end of that detached body of sand are nine or ten soundings to a point opposite the West end of it; we probably have something like that this year since that chart is about one-half as large as Exhibit 5. We did not get all the soundings on that chart, that is why they look so open-like. The 1932 map and these other maps, are not copies of the map we made; it is a draftsman's interpretation of the same and it is a system we use in the Department all the time.

Re Redirect Examination:

Explaining more fully what is meant by variations in the channel, I will say that in my experience, in twelve years, during which I have been walking around these low water sands, we can recall there

[Testimony of C. R. Glasgow.]

one day when the sand will be piled up in certain spots [161] and deep in others. We can go back in two or three days and they will be shifted quite a perceptible amount. It is washing away one day and piling up the next day. These shifts and changes amount to quite a bit in the course of six months,—that length of time. I have not observed these changes in time of storm. You can't work in storms. I haven't been out there under these conditions, but I have afterwards.

Q. Tell the court what happens with respect to the shifting of the sands after a storm, or the shift that is caused by the storm.

A. I don't know I can explain the result but I am not qualified to explain the action.

Q. Just the result is what I mean.

A. It causes—due to some reason, I don't know why, but the channels shift from east to west; that is, the main movement in that vicinity; an easterly-westerly movement of the channel on the waters of Baker's Bay. There is a large body of water there, and on the lower tides they have a tendency to wash deep channels, and then for a period of some time there will be higher tides, and they won't go to that depth, and what washed out the channel one day will build up into a sand spit maybe ten or fifteen days later, during the differences in tides. It is not always due to storm.

[Testimony of C. R. Glasgow.]

Q. Well a normal tide—do those affect the contour of the channel?

A. I don't think a normal tide affects it very much in my opinion.

Q. Would abnormal tides?

A. Yes, sir.

I have noticed a channel shift fifty or seventy-five feet in the course of a week. I can't state any specific distance as to how far a channel may shift in a month, but in a couple of cases down there, in the course of a month, it shifted a couple of hundred feet that I know of. [162]

A. I am referring to the channel between Sand Island and Cape Disappointment, noted on the map as the "Ilwaco" Channel.

In a period of six months I have seen that channel shift a thousand feet. I have seen these extensive shifts on more than one occasion but not more than once to the extent of a thousand feet or more. It is not always jumping like that. The channel is in a constant state of flux and change, and the change is more violent and drastic in the winter time than it is in the summer time.

MR. HICKS: During those periods, just what happens to the sands lying southerly of Cape Disappointment, and those lying southerly of Sand Island: just describe that situ-

[Testimony of C. R. Glasgow.]

ation, those certain changes that you have noted occur there.

A. Well, as I said before, they dig channels in a certain place—they don't build up on the sand—they don't build up such a high body of sand, but at lowest tide you can notice channels appear too. We have waded and swam and walked around at different times according to the times we know where to get our information.

Q. Have you observed sand spits thrown up from time to time? I am speaking of spits of some substantial area.

A. Well, yes, in the course of several months they build up to some considerable extent.

Q. And then have you on occasions seen these sands you are speaking of, in this same section here, wash away during a similiar period, or any period?

A. Yes, it has washed away, and in some places it has built up too.

I did not receive any instructions as to the manner in which the map was to be prepared and I was not familiar with the issues in this case. [163]

Q. I want to ask a question on redirect: What is the fact as to whether or not Sand Island is a military reservation of the United States?

MR. CLARK: I suppose whether it is, or not, is purely a question of law, of which this

[Testimony of C. R. Glasgow.]

witness would have no more knowledge than any other citizen.

MR. HICKS: I can call an official of the Department that it has been long identified by the Department.

COURT: I imagine the way to establish that is by the best evidence because it belongs to the government.

MR. CLARK: I think as far as the facts are concerned, I can tell you what they are:

MR. HICKS: Glad to have you state them into the record; I am sure they would be correct.

MR. CLARK: Whether Sand Island was, or not, at the time above high water, and therefore a part of the public domain, we are not concerned, but during the Civil War, President Lincoln withdrew what was identified as Sand Island for military purposes—withdrew from entry—and on October 21, 1864, at the request of the then-Commander of the Columbia River District, the legislative assembly of the State of Oregon ceded to the United States whatever rights the state had to the lands between high and low water abutting on Sand Island; that is, of course, the lands between high and low water, according to the rules of property of this state, was always vested in the state, regardless of who owned the upland. That, I think, is the entire official history of Sand Island, as far as the State of Oregon and the United States are con-

[Testimony of C. R. Glasgow.]

cerned. We do not, by that, admit that it has ever been used or occupied for military purposes, or for any other purpose by the government, and except as it has been leased, we do not admit that it has been given as vacant land, unoccupied and unused territory, but as to its title, and use for which it was withdrawn, President Lincoln withdrew it for military purposes in 1864.

MR. HICKS: Do I understand you go far enough to say that it is a military reservation of the United States?

MR. CLARK: We have admitted that in 1864 President Lincoln withdrew it from entry as part of the public domain for military purposes. Beyond that there never has been, as far as I know, any official action taken by the President, the Land Department or Congress or any other branch or agency of the government, and whatever its status, it must be dependent entirely upon the order of President Lincoln withdrawing it from public entry for military purposes in 1864. I know of no other official action taken at any time. [164]

MR. HICKS: If we could extend the stipulation one point further to show that since the time of President Lincoln's designation as counsel has noted, the island has been under the jurisdiction and supervision and management of the War Department of the United States.

[Testimony of C. R. Glasgow.]

MR. CLARK: I don't think that is a fact during the history of the island, but I will say that for a great many years, and under the authority given by Congress, the Secretary of War has exercised authority to lease fishing privileges on the land, the right to land drag seines on the island from time to time, since 1894. Prior to that time, occasionally the Commanding Officer of this District has seen fit to make leases. My recollection is the second lease made by the Commanding Officer was adjudged to be invalid for lack of authority of the Commanding Officer to make the lease, but for upwards of twenty years the Secretary of War from time to time has leased the island as part of the lands or public property under the jurisdiction of the War department, and has exercised that authority without apparently being challenged.

MR. HICKS: The court will take judicial notice of the case, *Washington vs. Oregon* in Volume 211, U. S. Supreme Court Reports; also the decision on rehearing of the case under the same title in 214 U. S. Reports.

COURT: There is an objection to this witness answering that question. That is the condition the record is in now. The objection will be sustained. [165]

Re Cross-Examination:

When I said that the channel was in a state of flux, I meant moving either one way or another

[Testimony of C. R. Glasgow.]

pretty nearly constantly. The channel I referred to was the main cut-off channel between Cape Disappointment and Sand Island. I did not mean to include the entire body of sand between Sand Island and Cape Disappointment. There is some I show above high water there that is not moving at present,—right close to Sand Island, attached to Cape Disappointment.

1935 was my thirteenth annual survey, and that has been my idea of conditions during all of that time. The changes go on every year. They are not always at the same rate. They vary a little. Some years the conditions change to a greater extent than others. You can follow the changes on the chart. I have had to do with compiling information in making these maps since 1923. The map of 1923 was the first on which I worked.

Referring to the 1922 map, the area marked "Peacock Spit" refers to sands between high and low water on the Columbia side of the North Jetty. The left side, ordinarily, is a channel, the depth running from eleven to twenty-nine feet, and opposite that is a body of land above low water marked "Sand Island."

Q. Calling your attention to this sand, you say is in a constant state of flux, marked "Peacock Spit." I call your attention to the first map you made. Now the general conformation marked "Peacock Spit," the sand where that is below high water and above low water, is substantially the same a year later?

[Testimony of C. R. Glasgow.]

A. It would to you, if you look at it,—but if I look at the map, it is different.

Q. There has been some slight encroachment in the way of bays, and things of that kind?

[166]

A. Couple of thousand feet or some such matter.

Q. Your map does not show whether that depth is six inches or sixteen feet below the rest of it?

A. It does not.

Q. It is just anything below low water mark?

A. That is right.

Q. That bay, you say, is two thousand feet wide: maybe it is six inches on top of the sand; washed off. It may be a real encroachment there now. That is correct?

A. Yes

Q. This channel between Sand Island and Peacock Spit is still there, isn't it?

A. In a different location, yes. There is the channel there.

Q. Is there any substantial difference in the east side of that channel?

A. You mean between those two bodies?

Q. Yes,—the channel between the two is for practicable purposes substantially in the same place?

A. Except that it has moved a little bit eastward.

[Testimony of C. R. Glasgow.]

The 1923 map, which is the first one I made, shows the channel between Sand Island and Peacock Spit in substantially the same location as on the 1922 map, except that it has moved a little to the Eastward, and this sand between high and low water on Sand Island is narrower; shows the channel encroaching on Sand Island and Peacock Spit has built a little further Eastward in two years, moving towards Sand Island. On the next map, Peacock Spit above low water is about the same as on the preceding maps. The channel between Peacock Spit and Sand Island is substantially the same, except it is still moving a little eastward towards Sand Island with a recession on the part of Sand Island, with a depth of water up to 25 feet. The next map shows the channel substantially the same as on the preceding maps. It shows a little projection on Sand Island, which has the effect of an erosion; Sand Island is [167] eroding off on the Peacock Spit side, and Peacock Spit is building out towards Sand Island. The map I have last referred to is the 1925 map. Peacock Spit appears about the same as on the preceding map and Sand Island about the same, and there is another body of sand between the two, which shows above low water. On the preceding map, this area of new sand showed from two to six feet of water; along side, running from 11 to 21 feet deep; showed that sand was growing up from the preced-

[Testimony of C. R. Glasgow.]

ing year, but had not gotten up above low water. I never heard of this sand being known as "Oregon sand;" never heard that expression.

On the 1927 map, Peacock Spit has moved Westward a little with a little erosion off the East side, the side next to the new sands I have just referred to. Peacock Spit is substantially the same shape as before, with a slight erosion on the Oregon sand side of it. On the 1928 map the Oregon sands have changed their shape, but are still there, to a much lesser extent, surrounded by water running from 16 to 19 feet, and Peacock Spit has eroded off a little toward the Oregon sand side, but is substantially in the same form and is substantially the same. The depth of the water on the South, the Columbia River side, of Peacock Spit has varied slightly on these maps. The contour lines indicate: five dots is thirty feet; six dots is thirty-six feet; and the dash line is forty feet.

The 1929 map shows Peacock Spit broken up into seven or eight pieces with a channel across it, but the other channel along side Sand Island is still there. I saw the ship on Peacock Spit and know by hearsay that it was blown across from the Columbia River East through Peacock Spit into Baker's Bay, and was afterwards brought out through the channel alongside Sand Island. [168]

[Testimony of C. R. Glasgow.]

Mr. BOWERMAN: Did you have any connection in your observations there with the passage of this boat through Peacock Spit and the chanel that you sounded and show on this map that year?

A. I don't attach any significance to it; no sir.

Re-redirect Examination:

Q. In the map of 1931, Mr. Gascow, it is noted that there are no soundings for the channel between what has been just now styled the Oregon Sands, and Peacock Spit, and that there are soundings shown alongside the southerly shore of Sand Island?

A. Yes.

Q. Now what has been the practice of your Department in the matter of making soundings? Do you sound areas other than those which may be used for vessels and transportation?

A. Yes, sir, we do sound those, but at very rare intervals, just as a sort of check on what is happening in the vicinity; but most of the soundings are down the channel.

Q. Would there be any advantage in using the other one of the channels I have just referred to—using this channel that appears along the southerly shore of Sand Island, instead of the channel lying westerly, that I have indicated? Be any advantage in using this channel over this one to the west?

[Testimony of C. R. Glasgow.]

A. Oh yes, sir.

Q. What would be that advantage?

A. Is a question of navigation; if one is not deep enough to sound, it is not deep enough to navigate to advantage; would have to go where the water is.

Q. Would there be any other advantage in taking this inward channel here, over this channel here, assuming that was deep enough for navigation?

Mr. CLARK: You mean taking the one next to Sand Island?

Mr. HICKS: Yes, the one next to Sand Island.

A. There would have been advantage, yes; the surf in that channel was pretty high due to shoal water.

Q. Would that be an advantage that would be of some account and some importance to one operating vessels through that section?

A. Yes, sir. [169]

There would be no soundings available for the westward channel of the two channels I have mentioned. You can't tell where the channel is when the depth of water is not there to sound it. Unless you just sound the whole section, you can't pick out where the channel was. When we go there at low

[Testimony of C. R. Glasgow.]

water, you can locate the channel accurately, but if we go in deep or high tide, we don't know where the channel is, and would be sounding for a week trying to find that channel. The several maps I have referred to give the conditions of these channels and the condition of the sands at the particular dates on which the respective maps were prepared. There might be variations in the channels and in the sands, say, six months later. I do not know what the contour of the sands might be later from that portion on the maps. [170]

The 1930 map shows the channel next to Sand Island with a small channel branching from it and the new channel farther North and cutting across Peacock Spit. The channel next to Sand Island was sounded, but not the one across Peacock Spit. Peacock Spit was flattened out and enlarged on this map, but covers the same area towards Sand Island. Sand Island is shown on this map as still receding towards the East. To my knowledge it has been doing this all the time I have been there. During this entire period, Sand Island has been eroding and Oregon Sands, or Peacock Spit, have been following it up. I never knew the sands as "Oregon Sands," but I understand what is meant by the question.

On the 1931 map, Peacock Spit and what was formerly an [171] independent body of sands above low water, is now a compact body and includes a part of the territory which was previously marked

[Testimony of C. R. Glasgow.]

Peacock Spit. It is all joined and on this map is still termed "Peacock Spit", I notice. I called it Peacock Spit on the map I made for that year, and Peacock Spit is the only designation that has ever been given on any of these maps for that area.

The channel next to Sand Island was the only navigable channel at that time, and for that reason it shows soundings, and the channel through Peacock Spit was not sounded as it was not deep enough for navigation, except in emergency. The sands extending out from Peacock Spit are still growing Eastward, South of Sand Island, and parallel to it, and in the 1932 map it is not only growing against the West shore of Sand Island but along the South shore and that is the body of sands I have previously mentioned as being a part of Peacock Spit.

The North end of the channel along Sand Island is closed on the 1933 map and the channel through Peacock Spit shows soundings. A channel has been across from Peacock Spit since 1929, but has never before been deep enough for navigation, and this body of sand extending from Peacock Spit is now extending still further South of Sand Island and has formed a junction with the West shore of Sand Island. The 1934 map shows substantially the same condition, except that the channel through Peacock Spit has moved further East. The 1935 map shows the channel has moved still further East towards Sand Island. This channel has been moving Eastward towards Sand Island for the last three or four

[Testimony of C. R. Glasgow.]

years; toward the Northerly end of the West side of Sand Island this channel is now up against the island, like the old channel used to be. If the movement of this channel continues, another year or two, to move Eastward towards Sand Island, it will be in the same location as the channel shown on the maps begining with 1924 and continuing up to 1931.

[172]

C. L. ROGERS,

a witness for plaintiff, testified:

I am in the packing business, identified with the Point Adams Packing Company, and have been an officer of that company for fifteen years. I reside at Hammond, Oregon, which is about twelve miles by road, and possible six or seven miles by water, from Astoria. I have lived in the vicinity of the Lower Columbia for about forty years. In my capacity as an officer of Point Adams Packing Company I bid on certain sands and fishing sites near or adjacent to Sand Island. The first time was in 1931, and the second time was in 1934. These bids were made with respect to sites along the southern end of Sand Island as shown by maps that are put out by the War Department accompanying the bids. The bids were made to the War Department.

Columbia River Packers Association and Barbey Packing Company entered a joint bid on these premises in 1931, and I think a man by the name of Miller or Muller.

(Testimony of C. L. Rogers.)

“Mr. CLARK: 1931?

A. I think it was 1931.

Mr. CLARK: Barbey, and the Columbia River Packing Company has lease for Sites 1 to 5, in 1931, and in 1930, and '32 until cancelled in May of '32. Was a lease on these sites in 1931, and no call for bids.

Q. I testified I thought it was 1931, perhaps 1930.

Mr. CLARK: The lease is in evidence, and speaks for itself. Could it have been another date than 1931?

A. It could have been. I said I thought 1931. I have not looked it up.”

Regardless of what the date is, it is my recollection it is about that time. At the time I mentioned in 1934 the Columbia River Packers Association and Barbey Packing Company entered a joint bid. Plaintiff's Exhibit 7 for identification [173] is the proposal for bids called for by the War Department for these seining sites on the south shore of Sand Island dated April 20, 1934. That was the official form that was issued at that time for entertaining bids, and the form of bid executed by me for my company.

I am not positive that I saw the signatures of Barbey Packing Company and Columbia River Packers Association on proposals for bids, but I believe I did. They entered bids of a character similar to the one I entered.

(Testimony of C. L. Rogers.)

“Q. Can you state as a matter of fact that the Columbia River Packers Association and the defendant Barbey, or the Barbey Packing Company, did enter bids of a character similar or identical with the kind of bid you entered?”

A. Yes.

Mr. BOWERMAN: The witness said he didn't know. And these documents are not only in the possession of the government, but in this very same department of the government.

COURT: Yes, if you have the bids and they are in writing, that is the best evidence.”

I am familiar with the premises upon which I entered my bid. I have seen them off and on for a good many years, probably I would say off and on all my life. The entire southern shore of Sand Island has been leased in times past from one end to the other. It is not one continuous tract of sand. At the present time it is separated by reason of the building of these jetties, if that is what you mean, but prior to that time it was one continuous body. The proposal for bids in 1934 called for six seining sites, but the way the bids were gotten up you had to bid on the entire lot. I entered my bid in that manner and the defendant companies so bid on the property.

Regarding the contents of my bid, I know without [174] reference to that document the lands and location of the sands upon which my bid was entered.

The witness was then requested by counsel for plaintiff to mark the lands and location referred to

(Testimony of C. L. Rogers.)

on one of the maps constituting Exhibit 1, whereupon it was pointed out that there was a map attached to the form calling for bids in 1934. Thereupon the following proceedings were had:

“Mr. HICKS: This is Government Exhibit 7. I am glad to offer it in evidence.

Mr. BOWERMAN: If the court please, I want to again insist that no matter what order they make, or what invitation for bid they make, if they undertake to lease something they don't own it is not evidence against anybody, and they can't introduce a proposal of that kind for the purpose of showing title, and that is all this case is about, a question of title. What difference does it make if they map that whole country down there and state they will lease it; is that evidence of ownership?”

It appeared that the government had called for proposals for bids on certain sands on Sand Island in 1934; that Point Adams Packing Company had made a bid. No bids were accepted by the government and no lease made for 1934 on any sites on Sand Island. Exhibit No. 7 for identification was not received in evidence and no bids made by the defendants or anyone else for the year 1934 on sites on Sand Island were received in evidence.

The portion of the lands that were covered by my bid extended from the easterly end of Sand Island straight on down along the low water mark, embracing the sands covered by red marks. I don't

(Testimony of C. L. Rogers.)

know what they mean. Referring to the sands lying just southerly of Sand Island and running the entire length of the shore line, starting from the eastern point and going from one end to the other.

Thereupon the following proceedings occurred.

[175]

“Mr. BOWERMAN: Now if the court please, I move to strike the witness’s answer, because it is an oral interpretation of the vital part of the written instrument that is not in court, but existing, and is in the possession of the party producing the witness. It is his idea of what was covered.

Mr. HICKS: For the purpose of the record I want to say I don’t have that original bid, and I don’t believe they are available. There are some records kept in Washington which cannot be obtained. It may be this can, but we do not have it. We have a transcript of the evidence of the bid of the parties that was entered into in 1934 with respect to these premises.

COURT: Would the transcript show the description of the premises?

Mr. HICKS: I am not positive it does.

COURT: You may look the document up until I rule.”

Aside from the one time when calls for bids were made by the United States as I have testified, for seining sites on Sand Island during the year 1934,

(Testimony of C. L. Rogers.)

there were no other calls for bids that year on any premises on Sand Island or any of the sands adjacent to or abutting from Sand Island. That was the only time that any bids were called for for seining purposes, and that applies to any location on Sand Island or the sands immediately adjacent thereto or abutting thereupon.

I observed the seining operations that were conducted on the island in 1934. They were drag seine operations.

“Mr. CLARK: You mean on the sands and south?

Mr. HICKS: Yes, Sand Island and the sands to the south, the premises we are discussing.”

There was quite an extensive operation there of seining, operated through Barbey Packing Company and the Columbia River Packers Association. I would not attempt to estimate the number of horses used. I didn't attempt to count the number of men, but I imagine around one hundred. I saw these operations only on one or two occasions in the [176] month of August, 1934. I did not observe any seining operations on these premises in 1932 or '33. I was not down in that vicinity in those years while seining was being conducted and I don't recall that I was down there in '30 or '31. I probably was, but I have no recollection. The only time I have seen seining operations on the island and on the sands that we are speaking of in recent years was in 1934. Prior to 1930 I can recall no specific dates or years

(Testimony of C. L. Rogers.)

or instances. I have been down there but I can't recall just when they were.

"Q. Well, be as specific as you can; where were the locations: Where was the location of the dragseine operations that you are referring to, on the sands in this immediate vicinity or the sands lying just south of Sand Island and abutting from Sand Island?

A. Along the southern shore of Sand Island, what we know as Sand Island."

I am referring now to the same premises that I bid on in 1934 along the southern beach line of Sand Island.

"Q. Do you know whether or not said premises were so seined and operated under lease or license from the government of the United States?

Mr. CLARK: You mean in those years he can't identify?

Mr. HICKS: If he knows; he is making it as specific as he can.

* * * * *

Mr. CLARK: Objected to as not the best evidence.

Mr. HICKS: If he knows, Your Honor.

* * * * *

Mr. CLARK: That is certainly calling as to whether or not a certain document existed and certainly for the contents.

(Testimony of C. L. Rogers.)

COURT: He may answer yes or no, and then you can inquire if he has actual knowledge. I don't know what knowledge he has.

A. Do you refer to the year 1934, or prior years?

Q. I am referring to prior years. [177]

A. I would say that no operations could have been conducted on Sand Island without a lease from the United States Government. I have never known of any seining operations being conducted there without a lease from the government.

Mr. CLARK: I move to strike that out as a conclusion; he obviously has no knowledge; he doesn't say he saw any leases.

COURT: He says he knows, I understand. Did you say you didn't know whether operations were conducted under government lease or not?

A. I said I didn't know of any operation that had not been conducted under lease from the government in years prior to 1934.

COURT: You can move to strike that out.

Mr. CLARK: Yes, I move to strike that out.

COURT: He will have to show how he had knowledge of it."

The practice of the government is to issue a circular proposal for bids and send them out to all interested parties, which permit those interested to enter competitive bids which are then opened and the bid ordinarily awarded to the highest bidder.

(Testimony of C. L. Rogers.)

unless there is some cause, of course, why the government should not lease to the highest bidder.

“COURT: As the record stands the court has not ruled on the motion to strike. He has said that he didn’t know of any other leases that were operated except under government leases. I shall have to sustain that motion until he shows that he has knowledge of that fact. That is, how he obtained it, or what it is based on, in view of that motion.

Q. Was any document filed by you or your company with the War Department with respect to the matter, which would constitute you an interested party, or which would inform the Department of your interest in this matter?

Mr. CLARK: In which matter?

Mr. HICKS: In the matter of leasing.

A. In the matter of leasing seining sites?

Q. Yes

A. We have advised the War Department we were always [178] interested in leasing seining sites; but whether that is in the form of a written document, I couldn’t say. We have verbally informed the officer in charge at Fort Stevens, to that effect.”

I have examined Exhibit 2 and have noted the names of the operators who paid the rental shown in that exhibit. I saw the Barbey Packing Company’s operations on Sand Island, observed them

(Testimony of C. L. Rogers.)

from a boat in the river sometime during the period from May 1 to May 25, 1930.

"Q. Where were those premises that they were operating on at the time you mention, with respect to the premises which you bid upon and which you have identified on the map as of the year 1934?

A. Do I understand you to mean the premises that I indicated on that map?

Q. Yes.

A. Those operations extended further upstream from the point that I indicated there, during the time I was there."

The operations farther upstream and started approximately from the most westerly dike, thence upstream probably would be sites 3 and 4.

The operations in 1926, as near as I can fix the point was here (indicating). From a point below the letter "h" after the word "Sand Island", perhaps slightly westward of the letter "h", and then easterly up along the island probably about six thousand feet. The next operation that I recall was in 1934, which extended westerly from the most westerly dike down across the sands which are marked here in red to a point on the map where there is a figure "6." In other words, covering these sands (indicating), covering that area which would be westerly from the most westerly dike.

(Testimony of C. L. Rogers.)

Cross Examination

The plant with which I am connected is at Hammond, which is about four and one-half miles south and east of Sand Island. My company conducted no drag seine operations on Peacock Spit or on those sands which are marked in red or on Sand Island, in the years 1930 to 1934, nor in the years 1925 to 1930. I was not on the sands where the fishing operations were being carried on in 1934. On two occasions I was in a boat on the river in front of these sands. I did not stop there, nor tie up there, but cruised around there on the riverside twice in August, 1934. I probably cruised around there about two hours on the first occasion, and about three hours on the second. I was out there merely to see the seining operations that were going on. I was invited to make the trips by Lieutenants Howell and Thornton, of the United States Army, situated at Fort Stevens. I don't think they were making an official inspection trip. They told me they wanted to get some information as to the seining operations that were being conducted on what they claimed was a part of the government property, and they asked me to go along. I have no way of fixing the time when I saw fishing operations on these sands prior to August, 1934. It was sometime between 1925 and 1930; that is as near as I can fix it. My recollection is that the seining operations that I saw during that time were on the shore of Sand Island easterly of

(Testimony of C. L. Rogers.)

where the westerly dike is. I only saw these operations on Sand Island easterly of the westerly dike between 1925 and 1930 once. I cruised by there once during that time. The fishing operations I saw in 1934 were westerly of the most westerly dike. That is to say, the operations I saw prior to 1934 were along the shore [180] of Sand Island easterly of the point where the most westerly dike is now located, and the fishing operations I saw in 1934 were westerly of the most westerly dike. At the time the fishing operations were being carried on on Sand Island between 1925 and 1930 I knew that Columbia River Packers Association was carrying on fishing operations on Peacock Spit.

"Q. Mr. Barbey was carrying on fishing operations on Sand Island easterly of where the dike is now located, and the Columbia River Packers Association was carrying on the same type of operations, drag seine operation, on Peacock Spit?

A. That is correct."

I never had a lease on any part of Sand Island, and I never saw a lease on any part of Sand Island that was executed. [181]

A. E. CLARK,

a witness for the plaintiff, testified:

I am one of the attorneys in the case, representing the defendant Barbey. I remember a conver-

(Testimony of A. E. Clark.)

sation which you, Mr. Hicks, had with me about twenty days ago, in which you inquired as to whether my client anticipated carrying on drag seine operations on the premises in dispute in this case.

“Q. Just a moment, please. And do you recall at that time whether or not I stated to you that if such operation was not contemplated this case might under instructions from Washington, from the Attorney General, be continued, and didn't I ask you to ascertain that fact, that is, whether an operation was contemplated, and to let know, and upon that decision the case would be set down for hearing or not, as the facts might show.

A. That is part of the conversation that occurred. Do you wish me to state the conversation?

Q. I wish you would, yes, please.

A. You came to my office and we discussed the case. My recollection is the first part of the conversation dealt with your suggestion that you were figuring on bringing in the State of Washington because of its alleged interest; and then you said that—spoke about some difficulty in getting the case assigned because of the disqualification of the two local judges; and said, that if there was no intention on the part of the defendants to undertake to fish upon the disputed premises, probably you could get au-

(Testimony of A. E. Clark.)

thority from the Attorney General—I don't know whether you said to dismiss the case, or not to press it. But that was the substance, and you asked me to ascertain what the attitude or purpose of the defendants was. Now, either at that time or a day or two later after I had conferred with the defendants, I told you what the position of the defendants was. I don't recall whether it was that same day, or two or three days later, but I think it was the same day we discussed the situation that had developed. There were sands down there on what we might now call the south point of Peacock Spit. I think I told you at that time that they had been surveyed in 1928 by the State Land Board, and Barbey had obtained a lease; that the Barbey Packing Company, or rather the Baker's Bay Fish Company, had obtained a lease, as you understood from the State of Washington, of Peacock Spit, in which Barbey and the Columbia River Packers were interested, and that the initiative law of Washington adopted in 1934 prevented the obtaining of licenses to fish in Washington; and that it was the purpose of the defendants in this case to ask the State Land Board of Oregon to offer these lands which they had surveyed and had leased in 1928, for leasing at public auction; and if the State Land Board did offer these lands for leasing, and our [182] clients became bidders, and were the suc-

(Testimony of A. E. Clark.)

cessful bidders and got a lease from the State of Oregon, that our clients would undoubtedly undertake to fish those sands under lease from the State of Oregon. I think we talked the whole situation over at that time, and that is the way the matter was left. My recollection is—I am not sure, but in that conversation, or rather in a conversation a few days later, after talking the matter over with Mr. Barbey, you were advised that an application was made to the State Land Board, or would be made, not for a lease, but that they advertise the sands for lease; and that was done, and I think I handed you day before yesterday a request made by my clients to the State Land Board that they advertise these sands for leasing, and they have not done so. Our clients have no lease.

Q. Mr. Clark, when you say 'those sands' you refer to the sands that are in dispute here, don't you; the sands lying southerly of Sand Island and abutting——

A. Well, to make that clear, the sands upon which the request to the State Land Board was based are the sands that were surveyed in 1928, platted out, and which were leased in 1928 by the State Land Board of Oregon to the Columbia Fish Company, controlled by Mr. Barbey, and upon which he seined to some extent in 1929. Now the request to the State Land Board was a request to advertise these particular

(Testimony of A. E. Clark.)

sands, using the precise description that was obtained from the survey of 1928. Now these sands in fact, by building up to the north and west, somewhat joined with what we have been referring to here as Peacock Spit, and now one continuous body of land.

Q. So the record may be clear on that, did you and I have Mr. Lewis, who has heretofore testified, and Mr. McLean, who is here in your behalf, plot out on the map of 1934 the area covered by your application, the one you have just referred to?

A. We requested them to; and we furnished them metes and bounds, descriptions contained in the document I hold in my hand, and which are the metes and bounds descriptions fixed by Mr. McLean when he made his survey of 1928, and I presume that Mr. Lewis and Mr. McLean accurately plotted out these metes and bounds descriptions on the map of 1934.

Q. And how is that designated on the map of 1934?

A. That is—that area is designated by solid red lines; there are a number of red spots around, made by other witnesses, but it is a solid red line outlining what might be broadly referred to as a triangular tract extending northwest and southerly and approximately south of the words "Sand Island." Do you wish to put this in evidence? It might be helpful to

(Testimony of A. E. Clark.)

the other engineers if they wish to check out the metes and bounds outline." [183]

Thereupon Exhibit 8 was received in evidence, which is as follows:

GOVERNMENT'S EXHIBIT 8

Traverse around Sands

Instrument at Hub on sands.

Bearing to Lighthouse—N 69°-02' W

Thence along edge of sands

Angle	Distance	Bearing
31°-54' Right	530	N 37°-08' W
14°-16' Left	1300	N 51°-24' W
54°-06' Left	870	S 74°-30' W
122°-22' Left	1200	S 47°-52' E
56°-06' Right	1200	S 8°-14' W
125°-42' Left	800	N 62°-32' E
19°-59' Right	1270	N 82°-31' E
130°-49' Left	687	N 48°-18' W

to point of beginning containing 52.39 Acres. [184]

This application I assume was filed with the State Land Board. It was prepared in our office.

"* * * We prepared in our office not an application for a lease, but a request to the State Land Board that under the statutes of Oregon it advertise these sands for leasing. The statute requires that this, as well as other state property, be advertised, for, I think, not less than thirty days, in not less than two newspapers, and the advertisement must call for bids. I

(Testimony of A. E. Clark.)

think they are required to let the lease to the highest responsible bidder, under the law. I presume that the application or request that they advertise the lands for public use, was filed. I did not go to Salem in connection with the matter."

I obtained no fishing license from the State Fish Commissioner of Oregon to fish this particular area or section.

"A. All I know about that is this: I have been told, and I think it is a fact, that the Barbey Packing Company and the Columbia River Packers Association have obtained licenses from the Master Warden of the State of Oregon to fish with drag seines, and I presume the location where this operation may be carried on will be found entered upon the licenses; and I would suggest in order that the record may show precisely what area the licenses cover, that we have the licenses produced, because I would not be able to say offhand just what location those licenses do cover.

Q. Mr. Clark, the answer and amended answer that were filed in the proceeding, were they prepared by you, or in your office?

A. I think that they were mechanically written in our office, and it may be that the final draft or dictation was by me. They were the result of several conferences between Mr.

(Testimony of A. E. Clark.)

Bowerman and myself before they were put in final form, of course. I think, however, the typewriting was finally done in our office."

* * * * *

Q. Now what is the fact as to whether or not you have been using your best efforts to obtain fishing locations in behalf of the Barbey Packing Company and Mr. Barbey, to lease sands and to use and operate drag seines upon these disputed premises in this case?

A. Well I have told you all the efforts we have made, and I will admit that as to the efforts we did make they were the best we could make. The only effort we have made so far is to request the State Land Board [185] to advertise those sands which they leased in 1928, for public leasing now, in the hopes that we may become—our clients may be the successful bidders. They may not be."

In the State of Washington there is a lease out on Peacock Spit which the State of Washington claims takes in all of these sands. Oregon claims it owns part of the sands. In Washington I don't think since last Fall a drag seine license might be issued because of an initiative bill passed by the people of Washington in 1934. The question of the constitutionality of the law was argued in the Supreme Court of Washington some weeks ago, as I understand it. Aside from that there has been no effort made to get a location, and I had nothing to

(Testimony of A. E. Clark.)

do either with the issuance of fishing licenses or the application therefor. The lease made in 1928 by the Oregon State Land Board, which I referred to, was not only for a period of one year, it was for a period of either three or five years. The sands were building up, there was some fishing done on them in 1929, and then the lease was subsequently cancelled because the State of Washington claimed the sands belonged to it and threatened to prosecute Barbey, and of course, if prosecutions were undertaken and sustained the gear would be confiscated, and we advised Mr. Barbey not to take a chance of being arrested and having valuable gear confiscated. I told the State Land Board he didn't want to get into a controversy between the two states, and the lease was cancelled I think in 1930. Barbey was the president of Columbia Fishing Company, to which the lease was made.

Cross Examination

"Q. The threat to fish down there by the defendants, as far as you know, consists of application to the State Land Board for a lease, that is, application to the State of Oregon to advertise and give an opportunity for everybody to bid on the lease, so anybody [186] could fish.

A. Yes, that is as far as the matter has progressed as to any of these sands in the State of Oregon. As far as I know it is merely a request made by Mr. Barbey, I know, and I think

(Testimony of A. E. Clark.)

the Columbia River Packers Association have signed the request, that the State Land Board simply advertise these sands for leasing to the highest,—as the statute requires, of course—the highest responsible bidder. I think a hearing was had—I was not present; the State Land Board, as far as I am advised, has not yet taken any action with respect to whether it will or will not advertise these sands for leasing. If they do, and they are leased, they will have to be leased, under the law, to the highest responsible bidder.”

* * * * *

I think a correction should be made. I said the 1928 lease of the State Land Board to Columbia Fishing Company had been cancelled by the State Land Board for the reason I gave in my testimony. Since that testimony was given Mr. Wade, an Assistant to the Attorney General of Oregon, has told me that there was no formal cancellation made by the State Land Board. Apparently what happened, the Columbia Fishing Company paid two years rent and, for the reasons stated yesterday, that is, threats by the State of Washington, the Columbia Fishing Company just quit operating on the sands. No further rent was paid, and there was no further operations on the sands. The lease subsequently was terminated by limitation. I assumed that there was a formal cancellation, but apparently there was not.

(Testimony of A. E. Clark.)

The parties just quit functioning under the lease after two years rent had been paid, without action on either side.

* * * * *

Redirect Examination.

I told the attorney for the plaintiff a short time ago what I understand to be the fact, that the defendants have taken out some licenses to fish. I don't know how many. [187] They would have to take out a license for each drag seine they were going to operate. I had nothing to do with the securing of these licenses from the Master Fish Warden of Oregon. The licenses are available, undoubtedly. I don't know what description is contained on any of the licenses. I would much prefer that the licenses be produced than to undertake to state a description with which I am not familiar. I do know that the defendants have told me that they have licenses.

Recross Examination

“Q. That is, licenses to fish somewhere in that territory?

A. License to fish with drag seines down there, but of course to land the drag seines you must have a right to land upon soil at least above low water, which must belong to somebody. If it doesn't belong to the State of Oregon, or the State of Washington, it must belong to the government, because somebody owns, under the law of this state, all land above low water in the Columbia River. The state

(Testimony of A. E. Clark.)

has repeatedly asserted its right to control, sell or otherwise dispose of all flats and sands that finally emerge above low water. That was settled in the Van Dusen case."

Redirect Examination

I don't have a copy, authenticated or otherwise, of the fishing licenses issued. I am sure Mr. Barbey or Mr. Thompson will make them available, whether they are in the court room or not I do not know, but if they are not and you want them we will have them here at any time.

Recross Examination

Exhibit 9 for identification is a copy of the request or application that I referred to as made by the defendants to the State Land Board of Oregon, that the lands referred to be leased upon open auction bidding. This is a carbon copy I brought up from our office yesterday or the day before at the request of Mr. Hicks. I gave the original [188] out. I think the original was signed in our office by the defendants before it went to the State Land Board. I think the description in Exhibit 8 corresponds with the description in Exhibit 9. There is this difference: Exhibit 8 consists merely of description; Exhibit No. 9 for identification is the request to the State Land Board, including the description. I assume it is the same description that the engineers platted on the 1934 map; at least that is the description that the engineers were to plat on the map. I have no

(Testimony of A. E. Clark.)

means of knowing whether the engineers did plat this description on the map, because I did not follow their work while they were putting it on the map.

It is my recollection that the request had not been filed with the Oregon State Land Board at the time I had my first talk with Mr. Hicks, although I am not entirely clear upon that point. We discussed the situation with respect to the law in Washington. I have a distinct recollection that I told him we were going to make a request for a lease, or start the machinery in motion for a lease from Oregon. But I don't think that it had been done when I first talked with Mr. Hicks. The substance of what I told him was that we hoped the State of Oregon would advertise what we call the Oregon sands, being the same sands they advertised and leased in 1928. In that event our clients would bid on them, and if they were the successful bidders and got a lease on these sands they would attempt to fish them. Of course Mr. Hicks understood perfectly that if we were not the high bidder we would not get the lease, because he is quite familiar with the law.

Exhibit 9 was offered and received in evidence as follows: [189]

(Testimony of A. E. Clark.)

DEFENDANT'S EXHIBIT 9

May 31st, 1935

To The

State Land Board,
Salem, Oregon.

Gentlemen:

Application is made by the undersigned for the leasing, by open auction bidding, on the following isolated lands in the Columbia River, to wit:

Beginning at a point called the initial point being N. $32^{\circ} 8' 59''$ W. a distance of 28169.1 feet from the northeast corner of Section 7, T. 8 N., R. 10 W., W. M.; thence N. $37^{\circ} 8' W.$ 530 feet; north $51^{\circ} 24' W.$ 1300.00 feet; S. $74^{\circ} 30' W.$ 870 feet; S. $47^{\circ} 52' E.$ 1200 feet; S. $8^{\circ} 14' W.$ 1200 feet; N. $62^{\circ} 32' E.$ 800 feet; N. $82^{\circ} 31' E.$ 1270 feet; N. $48^{\circ} 18' W.$ 687 feet to point of beginning, containing 52.4 acres, more or less, being tide island in projected sections 14 and 15, T. 9 N., R. 11 W., W. M., together with all accretions thereto and enlargements thereof.

COLUMBIA RIVER PACKING
COMPANY, INC.,

by.....

BARBEY PACKING COMPANY

by....." [190]

(Testimony of A. E. Clark.)

Redirect Examination

I have a distinct recollection that I discussed with you (referring to Mr. Hicks) the matter of the application to the State Land Board.

"A. And I have a distinct recollection of telling you that if we didn't get the lease we couldn't fish down there. And I also have a distinct recollection of telling you that it was my understanding that we were going to take steps to have that advertised. Now I would not go as far as to say that I told you, or that we discussed what steps had been taken, but I do recall stating that that was under consideration. I think the steps were taken after we had the conversation, that is, the definite steps in the way of the request. I know we had quite a long conversation about various phases of the situation down there.

Q. Now is it not true, Mr. Clark, that it was to the interests of the plaintiff, and of your clients, and of yourself, if fishing activity was not contemplated upon the sands in dispute, to have the case continued, and you thought it might be disposed of in some other way; and didn't I in all good faith come and put my proposition up to you.

A. No doubt, Mr. Hicks, you came in absolute good faith and said if there was—if our clients were not to undertake any fishing down there that there would be no necessity of going

(Testimony of A. E. Clark.)

forward with the case. We discussed the fact that they couldn't get a license in Washington, so we concluded that phase of the controversy, and I told you, as you will recall that after the discussion the first time I told you I would have a further discussion with my client.

Q. Yes.

A. My recollection was with particular reference to what they were going to do about seeking to get a lease from the State of Oregon. Subsequently, after talking the matter over with Mr. Barbey—I don't think I talked it over with Mr. Thompson, I am not sure about that—but I did talk it over with Mr. Barbey, and I called you up on the telephone, or maybe you came to the office a second time; then I told you they were going to take steps to see if a lease could be obtained, and in that event we would fish if we could, and fish if we were not enjoined, in case they might be able to get a lease from the State of Oregon. And that I think is our position, as far as I am advised now; but on the question of your good faith in coming to my office, there is no doubt about that.

Q. And is it true that efforts to obtain this lease, and to obtain the right to fish the premises in dispute [191] here are being carried along and expedited as rapidly as reasonably can be?

A. Yes, I think so; the matter is still before the State Land Board. The State Land Board

(Testimony of A. E. Clark.)

has not decided even yet whether it will advertise those sands for leasing. My present information is that that matter will be the subject of another hearing next Monday, at which time the State Land Board may decide to advertise them for leasing, in which event they will have to be advertised for thirty days. The State Land Board may decide not to advertise for leasing, in which event the matter will go over.

Q. Mr. Clark, do you know whether or not the defendant companies had a lease or license to operate on these disputed premises during the years 1933 and 1934?

A. 1928—going back to 1928—I am going back to that because it is part of the history, the Columbia River Packers Association was operating on Peacock Spit and pretty well down towards these sands, and that was the year the Barbey Company leased—that is the Columbia Fish Company got the lease on what is called the Oregon Sands. That situation continued until 1930 or 1931. The Columbia River Packers Association was operating under a lease from the State of Washington, and as I recall it, the State of Washington gave a new lease in 1932, in which they undertook to assert jurisdiction over the entire Peacock Spit, including the Oregon Sands, which had joined onto Peacock Spit; and under that lease drag seine operations were carried on under that

(Testimony of A. E. Clark.)

lease and under license from the State of Washington. Under a prior lease—under a prior lease from the State of Washington and drag seine license from the State of Washington, carried on until 1932, and under renewed lease 1932, 1933 and 1934, all under license and lease from the State of Washington.

Q. Now the leases held by the defendants for the premises in dispute were cancelled under date of May 10, 1932, were they not?

A. You are speaking about another lease; you are speaking about a lease from the United States.

Q. Yes.

A. Yes. That is the last lease that was had on Sand Island, was taken—these sites 1 to 5 inclusive; was executed in 1930 and the lease was cancelled by the War Department effective May 10, 1932. In the meantime, of course, under the lease and license from Washington, the drag seine operations were being carried on on the [192] sands all those years, to the south of Sand Island.

Q. Well, there was no government leases after 1932 with respect to the disputed premises?

A. Well there was no lease at all, as far as I know, on any part of Sand Island. I don't admit the disputed premises are on Sand Island. I am not debating that with you; but

(Testimony of A. E. Clark.)

put it this way: There was no lease, as far as I know, on any part of Sand Island issued by the government of the United States after the lease of 1930, which was cancelled in 1932."

Whereupon the following proceedings were had:

"Mr. HICKS: I think we can stipulate this. May it be stipulated that on a date last week Mr. Bowerman, representing the defendant companies, the Columbia River Packers Company, and the Baker's Bay Fish Company, appeared before the State Land Board—and Barbey individually—and urged that the application which Mr. Clark testified to go through, and that the lands described in the application be put up for bidding. May that be stipulated?

Mr. BOWERMAN: Will be glad to stipulate if you will cover the field. If you will also stipulate that the Point Adams Packing Company, as represented by the plaintiff's witness, and other competitors, appeared and opposed it. I guess we are all willing to stipulate.

Mr. HICKS: Will be glad to stipulate that. And may it be stipulated further Mr. Bowerman, that you informed the State Land Board at that hearing that if the lands were left for leasing and the bids were accepted, that your clients, the ones we have referred to here, would bid upon the premises?

(Testimony of A. E. Clark.)

Mr. BOWERMAN: Oh yes.

Mr. HICKS: And fish.

Mr. BOWERMAN: I didn't undertake to commit my clients except to the extent that we would bid if given an opportunity. I didn't want them to feel I was making an idle gesture. I told them if given an opportunity we would bid, and bid a substantial amount, without naming it. I was authorized to make that representation.

Mr. HICKS: What is the fact as to whether or not this meeting of the State Land Board was called at your instance to entertain that question? [193]

Mr. BOWERMAN: I don't think so; I think that was a regular meeting had, as I understand. I was told that was an appropriate time to be there, but I didn't ask anybody to call a meeting, I am sure.

Mr. HICKS: I mean the matter of entertaining an application for bids. That was done at your instance as to that date, was it not?

Mr. BOWERMAN: I didn't look into their minutes. They had the Governor, the Secretary, the Treasurer, the Attorney General, and the Clerk of the State Land Board assembled there, and I understood it was a regular periodical meeting that I had been privileged to attend and submit this matter.

(Testimony of A. E. Clark.)

Mr. HICKS: You understand I am not speaking about the date of the meeting, but whether called specially for that purpose. I am inquiring to know whether the applications you filed there were brought up for consideration on your motion and at your instance, at that time.

Mr. BOWERMAN: I don't think so. The meeting was called, the Governor presiding, and I was given an opportunity to make an opening statement and present what I had to present orally, and this other document in writing, which was signed by the companies, and representatives of competing companies were there, present with their attorneys, and they made an argument against the State asserting its rights in the island, and that is the way it sets, as far as I am concerned, except the Assistant Clerk of the Board told me the other day he thought they were going forward and advertise for leases. Whether he spoke with authority or not, I don't know: he told me that this week.

COURT: Do I understand you are stipulating to what has been stated between counsel here now, now in the record?

Mr. HICKS: Yes, we are stipulating to that.

COURT: Conversation you had between yourselves?

Mr. HICKS: Yes.

COURT: It is stipulated.

(Testimony of A. E. Clark.)

Mr. HICKS: Yes, and may form a part of the record. I am asking to have the tide tables marked for identification."

Thereupon said tables were marked Government's Exhibits for Identification 10, 11, 12 and 13, but were not thereafter offered or received in evidence.

[194]

E. M. CHERRY,

a witness for defendants, testified:

I live in Astoria, was born there, lived there until I was a young man, came back in 1908, and have since there resided. I have worked in and about the lower Columbia River in various lines of shipping. I represent Lloyds of London, the San Francisco Board of Underwriters, am president of the Arrow Dock and Barge Company, president of the Port of Astoria, and in other lines of shipping, all of which have more or less bearing on the Port of Astoria and vicinity.

I recall a ship known as the North Bend going aground on the westerly shore of Peacock Spit. I think it was in February, 1928. The North Bend was a 4-masted sailing vessel. It had a tonnage length of about 204 feet, 40-foot beam and depth of hold about 14 feet.

The North Bend went ashore on the outside of Peacock Spit and a year later worked her way

(Testimony of E. M. Cherry.)

through the spit and came into the channel between Sand Island and Peacock Spit. I saw the movement of the ship across the spit. I have my log book here. The movement started on January 28, and ended on February 8, 1929. The point where the North Bend went ashore on the westerly shore of Peacock Spit in February, 1928, is shown here on the 1928 map (part of Exhibit 1) where the words "North Bend" appear. She dropped into the channel between Peacock Spit and Sand Island about opposite where she went aground, about opposite the star shown on the map. She dropped into the channel between Peacock Spit and Sand Island just about the letter "a" shown on the 1928 map. She worked her way through the spit during a heavy storm the following winter, that is, she went ashore in February, 1928, laid up there during [195] that winter and the following summer and fall, and went through the spit the latter part of January and the early part of February, 1929. As stated, the movement through Peacock Spit to the channel between the spit and Sand Island ended on February 8, 1929. We, that is the Arrow Dock and Barge Company, of which I am president, then towed her into Fort Canby, a short distance north, and beached her. She was full of water, and we pumped her out. On Sunday, February 10, 1929, we sent two boats down there and towed her to Astoria. In towing her to Astoria we followed the channel between Sand Island and Peacock Spit, which was

(Testimony of E. M. Cherry.)

pretty close to Sand Island. We were inside of Peacock Spit and off these sands. We followed the channel that is charted on the 1929 map adjacent to Sand Island. There was no other channel which we could follow from Fort Canby to Astoria at that time. The vessel had a length over all of about 225 feet. When she was towed to Astoria in February, 1929, she was drawing about 14 feet of water, and there was sufficient water in the channel to accommodate her. At the time the towing was done there was a ground swell that would increase the depth of the draft of the vessel maybe three feet, because of the rise and fall of the swells.

I would not exactly say there was a channel left where the vessel worked its way across Peacock Spit. There was a place where she went through, but you would hardly call it a channel; it was a sort of a gash in the sand. I am not sufficiently familiar with the subsequent conditions to know whether a channel did develop at that location; I have not been on Peacock Spit since 1929. [196]

Cross Examination of Mr. Cherry

The North Bend went aground in February, 1928, and rested on the sands about a year. During that time there were several attempts to salvage the vessel, but did not get very far. The owner, Kruse & Banks Ship Building Company, took off all the gear and equipment. They did not take off the masts. There was no machinery. They stripped the vessel.

(Testimony of F. M. Cherry.)

and after they had completed this operation there was scarcely anything left but the hull of the ship.

I observed the progress of the ship through the sands during the latter part of January and the early part of February, 1929. It took ten days for the ship to work through the sands. There were storms during that period. The vessel finally got through on February 8, 1929. Before that I went down and tried to pull her off. We tried to pull her off the first time on January 28, 1929, without success. I was down there several times during this period, and I was on the vessel when she came through.

Following the storm I did not see much difference in the location of the sands and spits and did not notice any channels that has been created following the storms.

"Q. Will you step over to the map here, of 1929, and state from your observation if that doesn't show the condition as it existed after that storm, as you observed it?

Mr. CLARK: That is the condition in May, is it, 1929?

A. May, 1929. No, it wasn't cut up like that.

Q. Just what did that storm do to Peacock Spit, do you know?

A. Well, it drove the North Bend through and made a kind of gash through there. That is about all I noticed."

(Testimony of E. M. Cherry.)

I didn't notice particularly what effect the action of the waves and storm had on the other sands of Peacock Spit. [197] Every storm changes a little bit, but not materially. As a rule heavy storms make some changes, but I don't think one storm would change anything. After this heavy storm the only change I noticed was that the ship had gone through the spit and there was a kind of a gash through the spit.

"Q. Now describe that gash through the Spit to the court.

A. Well, at high tide the sea, when a heavy sea, would pile up on the outside and kind of hurdle over and come through on the inside, but at low tide I say just like a gash in the sand; something like these things you got here, like one of these, like this one here."

The gash referred to immediately behind the ship I would say was around 50 feet. I am just guessing, something like that. I wasn't right there, I only know what I saw from the deck of the ship. As the boat was making its way through the spit the sea would hit the vessel and run up on both sides, and maybe made a gash one hundred feet where the boat was. The sand would fly back more or less. After the vessel got through the sea at high tide would hurdle through there. When we tried to tow the vessel off we always worked at high tide. It was full of water, partly aground and would not float

(Testimony of E. M. Cherry.)

until the tide came in, and when she got safely in the channel she had enough water to float. She was then drawing about twenty feet of water.

Witness excused.

[198]

G. T. McLEAN,

a witness for defendants, testified:

I live in Astoria, Oregon, have lived there since 1910. My profession is civil engineer, in which I have engaged for twenty-eight years.

During the years 1911 to 1914, inclusive, I was in charge of construction for the Federal Government on the North jetty, which extends into the ocean from Cape Disappointment. I had charge of all the preliminary work, a construction of channel, docks, warehouses, quarters, shops, tracks, trestles, and about half a mile of actual jetty construction. This work of which I had charge, in addition to jetty construction, included study of the whole of the mouth of the river, surveys of Sand Island, Bakers Bay, North shore, search for dock deposits in the background, and survey and study of the Cape itself with reference to determining the actual line that the jetty was to take. I left the service of the Federal government in connection with North jetty construction to take charge of reclamation work in the filling in in the City of Astoria and the construction of bulkheads on the waterfront. I was City En-

(Testimony of G. T. McLean.)

gineer and was on that work until we entered the war. I enlisted in the army and was in the army a year and a half, and after leaving the army was in contract construction for several years in and about Astoria. The last several years I have been engaged in engineering work and was engineer for the city of Astoria and the Port of Astoria. In connection with my general engineering work on the harbor and the waters of the Lower Columbia I have visited Peacock Spit, Sand Island and the waters in their vicinity all the way from twice a year to six or seven times a year ever since I left the government service, with the exception of the time I was in the army. During that time I have had [199] occasion to make surveys of the sands in these areas.

In 1928 I made a survey of sands which for convenience will be referred to as the Oregon sands. These sands are outlined on the 1934 map which is a part of Exhibit 1, by solid red lines on sands south and west of Sand Island. In making this survey I went on the ground and first established a location or point of beginning and located it with reference to the various survey monuments which were in that vicinity. I think this point of beginning was tied into four or five of these various United States survey points. After that point of beginning was located the outlines of these sands that were exposed were determined and then were platted on the map.

“Q. How do you determine the outlines of the sands to be platted?

(Testimony of G. T. McLean.)

A. In all surveys of sands in the lower river I have a man on one of the government tide gauges reading the tide gauge, and the tide stays at a low water stage for only a comparatively short time, that is, usually a period of time which is too short to make the full survey. And in order to be sure that the line which I am locating is the actual line where the water would be on the sands at low water stage, I locate both the line where the water—the edge of the water where it is at the time, and then have men proceed out into the water until they are in water which is one foot deep. Then I have two locations taken at a certain time, one of them is where the water would appear at tide which is that stage, and the other location where the water would be a foot deep at that stage. Then with the man reading the tide gauge I know how high the water was at that particular time, and I can interpolate between those two locations and find the exact point the low water would be on the sands."

In making these surveys I was actually on the sands all the time. I platted the line that was above low water except for cases where there had been a rise in the tide. The tide might have encroached on the sands as they would be on the actual low water stage, and that point was determined as lying between those two points located. My recollection is that there [200] were fifty-two and a fraction acres

(Testimony of G. T. McLean.)

of the sands surveyed and platted at that time as being above low water. It is the same tract and the same description contained in Defendants' Exhibit 9 (see page 94 supra) [see page 210 of this printed transcript].

I am familiar with the area commonly referred to on the maps and in local parlance as Peacock Spit, by actual contact from time to time since 1911, and prior to that time by studies I made of previous maps. I am familiar with Sand Island also by actual observation since 1911, and by study of prior maps.

“Q. Now I wish you would come here, and starting back we will say in 1917 or 1918—I believe Mr. Lewis stopped at 1920—beginning with the year 1920, can you state, both from your knowledge of the situation down there, and by making actual measurements on the maps, whether or not Sand Island along the westerly shore opposite Cape Disappointment and along down along the southwesterly shore has been building up oceanward, or receding?

A. I can.”

Carrying the history of Sand Island along at intervals from 1920, the map shows a cross at Latitude $46^{\circ} 16'$, where it intersects longitude $124^{\circ} 2'$. It also shows a cross at the same parallel East and West of that, crosses on the margins North and South of that, defining the North, South, East and West lines, that cross that I described and gave geographical location of as South and West of Sand

(Testimony of G. T. McLean.)

Island. I am speaking of the 1920 map as well as subsequent maps. In drawing a North and South line from point of which I gave geographical location through Sand Island and drawing one East and West, the southerly shore of Sand Island measures 2050 feet East of this line, and measures 1250 feet North in 1920.

"A. * * * in 1921 the shore line from that same point will be 2100 feet east, and going north to the shore line would be twelve hundred feet. In 1922 going east from the same point to the shore line would be 2150 feet; [201] going north to the shore line would be fifteen hundred feet; in 1923 going east from the point to the shore line would be 2500 feet; and going north from the same point to the shore line would be 1750 feet. In 1924 map, going east from the same point would be 2950 feet, and going north from that same point to the shore line would be twenty-two hundred feet. In 1925, going east from the point to the shore line would be thirty-four hundred feet, and going north from the same point would be 2250 feet. 1926, the distance east would be 3700 feet, and going north to the shore line the distance would be 2450 feet; in 1927 the distance east would be 3900 feet, and north to the shore line would be 2400 feet. In 1928 the distance east would be 4600 feet, and the distance north 2450. In 1929 the distance east would be 4600 feet, and the distance north goes

(Testimony of G. T. McLean.)

to a point on Sand Island where there has been a change, and a portion of it has detached from the island. If I take a prolongation westerly of the south line of the island where it would join the south line of the detached portion, it would be a distance north of 2850 feet, but if I omit the detached portion of the island and measure to the high water line of the main Sand Island it would be 3750 feet north. In 1930 the distance east to high water line would be 4800 feet and the distance north to high water line would be 3100 feet. The detached portion of Sand Island has disappeared on this map. In 1931 the distance east to high water line would be five thousand feet, and the distance north to high water line would be 3600 feet. In 1932 the distance east to high water line is five thousand feet. The line to the north just passes through the high water line in two places. The measurement to the first place would show it as 4600 feet north.

Q. That is the nearest point?

A. That is the nearest point. In 1933 the distance east would be four thousand feet, and the distance north would be 2800 feet. In 1934 the distance east would be 4700 feet, and the distance north would be 4500 feet.

Q. Now on this map which has been introduced as Plaintiff's Exhibit 5, this sketch or partial map for 1935, are those crosses monu-

(Testimony of G. T. McLean.)

ments showing latitude and longitude on the map?

A. No, they are not."

I could spot the locations on the map for 1935 so as to make the measurements. The crosses on the map are what we call coordinates; they are not geographical positions of latitude and longitude. On the 1935 map there would be East 4400 feet to the shore line and North 5100 to the nearest point where it intersects the shore line. [202]

"Q. Then taking, comparing 1920 with 1934, the recession of the shore of Sand Island measured east from the point you have designated, according to my figures, would be 2650 feet, and the recession to the north between those two years would be 3250 feet net that the shore has washed away or receded.

A. Yes, that would be right.

Q. And taking 1935, the recession measured east would be 2450 feet, and measured north would be 3850 feet.

A. That is right.

Q. That is to say, the general tendency as to Sand Island along there was to erode or wash away instead of building up oceanward?

A. Yes, the island did that.

Q. And how long has that process been going on?

A. From about 1917."

(Testimony of G. T. McLean.)

The dikes jutting out from the south shore of Sand Island were constructed in 1933 and 1934. The most easterly, or upriver ones, were begun in 1932, and the most westerly, or downriver one, was in part constructed in 1933 and completed in 1934. The tendency of Sand Island to wash or break up has not been more marked on the easterly than on the westerly end. The easterly end during most of the last twenty years has been fairly fixed in position, with the exception of the extreme east, which for a period beginning about 1911 had a tendency to build east, and during the last six or eight years has had a westerly recession. There is a gap in about the middle of Sand Island where it has had a tendency to wash off the top at different periods and the water break through.

The sands which I surveyed in 1928, with reference to the point from which I made my measurements of the recession of the shores of Sand Island, were situated, as shown in the area enclosed in a heavy red line on the map of 1934, from 1500 to 3200 feet East of that point, and from about 500 feet north to 1500 to 2000 feet south. The closest point of the [203] sands surveyed by me in 1928 to the shore line of Sand Island, that is to the high water line of Sand Island, as shown on the 1934 map, is about 850 feet and in a southwesterly direction from Sand Island.

I observe on the 1928 map a charted channel along the southerly and southwesterly boundary of Sand

(Testimony of G. T. McLean.)

Island, and that channel was between Sand Island and the sands which I surveyed in 1928. The channel shown on the 1928 map between Sand Island and the sands surveyed by me in 1928 ranged in depth from 12 to 16 feet. The 1929 map shows the same channel between Sand Island and the area surveyed by me in 1928 with depths ranging from 12 to 15 feet. The same channel is shown on the 1930 map with depths ranging from 4½ to 12 feet, and on the 1931 map with depths ranging from 3 to 8 feet. These depths are all at low water. A normal high tide in these waters is about 8 feet, and to get the depth of the channel at ordinary high tide eight feet should be added to the channel depths to which I have testified and as shown on the maps. There is a lapse of about six hours between the ebb and flow of the tide.

The North jetty was completed about 1917. The last enrockment work done on the South jetty, excepting some work now in progress, was completed in 1913. I know as a matter of history that there have been sands down in the waters of the Lower Columbia that have been called "Breakers" at times, "Peacock Spit" at times, and "Peacock Sands" at other times. Taking up the map of 1920, where appears a body of sands marked Peacock Spit on the map, but not at that time connected with Cape Disappointment. There was some uncharted water between Cape Disappointment and Peacock Spit as shown by the 1920 map. [204] In 1921 this body of sand

(Testimony of G. T. McLean.)

was connected with Cape Disappointment and with the North jetty. During 1920 and 1921 there was a tendency to grow north. In 1922 the spit had grown east and had moved north a trifle. It still retained a definite shape and was a large body of land above low water. In 1923 the movement was to the east and south as indicated on the 1923 map, which shows one body of land above low water. The ship channel is between this body of land and Sand Island. The 1924 map shows that the growth of this body of land is still decidedly to the east, with about the same southerly limits as shown on the preceding map. The channel is to the east of this body of land and between it and Sand Island. The 1925 map shows a growth in a southerly direction, with a little growth to the east. And it also shows that about 40% of the area of Peacock Spit is now above high tide lines.

The 1926 map shows the same general contour of Peacock Spit, practically the same easterly limits, with some growth to the south, but with no land shows as above high water. It also shows some detached sands building up east of Peacock Spit.

“Q. You will notice that there is now a body of sand down about the location, approximately the location where you made your survey in 1928.

A. Yes, that is exactly in the same place.

Q. That is a detached body of sand which appears there above low water?

A. Yes, sir.

(Testimony of G. T. McLean.)

Q. With an uncharted channel of open water between it and Peacock Spit?

A. Yes that shows open water there with no soundings between there.

Q. And the channel between that sand—that body of sand which appears is 1926 just below Peacock Spit—the [205] channel is between that and Sand Island?

A. Yes, the ship channel."

This ship channel had depths ranging from 16 to 24 feet. The 1927 map shows that Peacock Spit maintained its same general outline except that a part of it has appeared again above high tide line. This map also shows a body of sands at the location of my survey in 1928, and there also appears above low water some sands between the area surveyed by me in 1928 and Peacock Spit. The 1928 map, compiled from surveys completed in May of that year, shows that some of these sands go below low water mark, but that there is an area above low water mark at the location of the 1928 survey. The channel between these sands and Sand Island then ranged from 12 to 17 feet.

In 1929 there were some very heavy storms. There was some breaking up occurred during that winter. The North Bend was driven through the Spit. The map of 1929 shows a body of sand above low water at the location of my survey of 1928, and also shows about 20% of Peacock Spit is above high water.

(Testimony of G. T. McLean.)

The map of 1930 shows a cutoff gap or gash through the Spit where the North Bend went through. That is uncharted, that is there are no soundings. This map shows sands above low water in the location surveyed by me in 1928. The navigable channel is East of these sands, between them and Sand Island. There is a channel with no soundings in it between these sands and Peacock Spit; that is, there is some open water there. Peacock Spit is consolidated again and is growing together with these sands I surveyed in 1928; both of them are growing larger.

Turning to the 1931 map, we note this cutoff gap or channel about where the North Bend went through, which is still uncharted, and that part of Peacock Spit South of this cutoff [206] channel has combined with the area surveyed by me in 1928, and the charted ship channel is between these sands, including Peacock Spit, and Sand Island. The whole body of land westerly of this channel, both above and below the so-called cutoff channel, is designated on the map as Peacock Spit, and according to this map was all above low water.

Turning to the map of 1932, it appears that these combined sands maintained substantially the same contour excepting that the entire body has moved easterly. The actual area is about the same, but there has been some erosion or washing off on the west and south, and they have grown or extended towards the east.

(Testimony of G. T. McLean.)

Turning to the map of 1933 it will be seen that south of this cutoff channel above referred to there is a solid, continuous body of sand which, since the preparation of the 1932 map, has formed a juncture on the north end with Sand Island.

The 1934 map shows the same general body of sand, very similar in area except that it has moved slightly to the north and somewhat to the east.

In 1933 there was still a channel between Sand Island and these sands, with an approach from the easterly end of the sands. The 1934 map, which is dated June, July and August of 1934, still shows a small gap along the side of the lower dike leading into the water immediately south of Sand Island.

1932 was the first time, at least as far back as 1920, that the channel between Sand Island and these sands was not charted. In 1920 there was no channel shown out of Bakers Bay west or north of Sand Island; at least no sounding is given. In 1929 there were soundings shown in the so-called [207] cutoff channel, with a controlling depth of four feet. In 1930 it was not charted, nor was it charted in 1931 or 1932. It was charted in 1933, with a controlling depth of five feet, that is five feet was the shallowest point. In 1934 it was charted with a controlling depth of six feet, and on this 1935 map or tracing (Exhibit 5) it is not charted; that is, it has no soundings except one or two.

Going back to the survey made in 1928, I used ordinary surveying equipment, such as transit, chain, stadiarod, etc.

(Testimony of G. T. McLean.)

I know the location of the several docks which were built on Peacock Spit to accommodate the fishing operations of the Columbia River Packers Association, and subsequently the operations of this company and Mr. Barbey, under lease from the State of Washington, and can locate approximately where these several docks were built. I will use the 1928 map, because it was in that year the first dock was built and it will give a more graphic idea of the movement. I will put three red dots on the map showing the location of the three different docks as they were driven. The first one was driven in 1929, and at a point indicated by the most northerly and westerly red dot which I have placed. The second dock was driven the following year, for the reason that the first had been covered by sands so that boats could not reach it. The water in front of the dock had shoaled up. The point of location represents the easterly part of the dock and the dock extended thence in a westerly direction to the land. When boats approached the dock they came through the channel between the sands and Sand Island. The dock extended from the sands into the channel between these sands and Sand Island. There was a small bay making off the channel between these sands and Sand Island [208] and the dock was constructed in this bay. The bay was inside, between the sands and Sand Island.

The second dock was built at the place indicated by the red dot, but a little to the south and east of

(Testimony of G. T. McLean.)

the first dot, and the third dock was built at the point indicated by the most easterly red dot, which is over near the channel marking of the channel between Sand Island and these sands. The dock was rested upon and was built out from these sands and extended northerly into the waters of the channel between the sands and Sand Island. I do not recall when the last dock was built. It was there in 1934 and the remains of it are there at this time.

Cross Examination of Mr. McLean

The calculations and measurements made at the beginning of my examination showed a recession of Sand Island northward. I took my calculations from this "X" on the 2' meridian. I did not calculate to the easterly edge of Sand Island but to the westerly high water of Sand Island as shown on the map and used the westerly edge of Sand Island all the way through in making my calculations in that direction.

[209]

The reason for my taking the point which I did is that it is the nearest; there are several other ways of showing the situation definitely and accurately, but there is no other way to do it more accurately.

"COURT: Let us find out what the witness is talking about.

A. These measurements have been taken by a line which runs east and west and measuring in all instances from a fixed, definite point on

(Testimony of G. T. McLean.)

that line east and west. That line east and west always runs through this shore line of Sand Island. Now, you can take another line which runs east and west and make your measurements by it. If you move that line too far to the south, of course it will miss the island altogether and won't pass through the shore line you want to measure to. But if you want to move that line five hundred feet north, a thousand feet north, it will still show the same progressive movement of the shore line of Sand Island. True, the further you move it to the north the less easterly movement it will show until you get to the northerly tip of Sand Island, where it will still show an easterly movement. Then when you pass on around into Baker's Bay and take the extreme north tip of Sand Island, which is entirely off the Columbia River, it will not show any movement there in any way. Now the same thing will apply in measuring the movement on a line running north and south. This movement we measured on a line running north and south, on a line through the island, and the measurements were taken from a certain fixed point on the north and south line, to the shore of Sand Island. No matter where you take that north and south line and draw it on any of these maps, the measurement will show the

(Testimony of G. T. McLean.)

movement northerly of the southerly line of Sand Island. Some places, if you draw it in certain places, it will show more northerly movement than it will in others. In other words, at the west end of Sand Island the movement has been more northerly than it has at the east end. At the south end of Sand Island the movement of a particular spot on the shore has been more on the south side of Sand Island than it has on the south.

Q. Now were you showing then a recession of Sand Island, or simply a recession of the southerly and westerly shore?

A. Was showing both things, both things about the same.

Q. Well now, to show the recession northerly of the entire island, do you think it projects an accurate delineation of that movement by taking your measurements from this little shore line here? I am speaking of the westerly end away from the shore line of Sand Island. Do you think that gives us an accurate picture of that situation? [210]

A. It is accurate on that part of the island, and that being part of the island—

Q. You understand, I am asking you about the tendency of this entire island to shift and recede northward?

A. I think I answered that by saying that is part of the island. That is part of the island

(Testimony of G. T. McLean.)

which moves, which actually did move due north. I also stated that the further east you went on the island the less the northerly movement would be.

Q. Isn't it true, Mr. McLean, that instead of the island receding northward, as you have suggested, that this little fringe of sands on the westerly and northerly shore of the island cut off, and that the main bulk of the island, and at least ninety-eight per cent of it didn't shift at all, as shown by your calculations?

A. No, that is not the case, because if the island was big enough, that percentage might be true. But if that southwesterly portion of the island—if you want to go back further than 1920, go back to 1917—if you want to take from 1917 up to the 1934 map, and you want to draw a line at right angles to the shore line of Sand Island, so as to correct any distortion of measurement on angles, you will find the shore line of Sand Island has receded on that line—on that line drawn at right angles to the shore line, for a distance of half a mile.”

The recession I was attempting to show was a recession of the southerly and westerly shore line.

I could establish the amount of this recession by taking a line drawn at right angles to the shore line of Sand Island, through the center of it, and tracing the movement of the shore line along that line, or I can take a piece of tracing cloth that I

(Testimony of G. T. McLean.)

can see through, lay it on the map of any year you want to start with, and trace the position of Sand Island, then lay that tracing in the same position on each succeeding map and see how the shores of Sand Island correspond from time to time. To show the entire picture it would be necessary to measure all points along the shore line of the island and show them all. The meridian line you suggested cuts through the center of what you say is the bulk of the sands of Sand Island, and that is one way I suggested a while [211] ago that the comparison of this island could be made. I do not think it would be either a fairer or more accurate way of measuring to measure between those meridian points and make my measurements with respect to the high water line of the island. I have measured two points on the island previous and the measurements were accurate on each of these points.

“Q. Now I will ask you to take the map of 1920 and with those two meridian lines I have mentioned, that of 124 minutes and two minutes, the two-point meridian being the one you made your calculations from before, and I will ask you to make your measurements there and note the locations and distance—we will say the locations of the high water mark on Sand Island between those points.

A. That is making measurements along a line beginning at the same point I used before?

Q. Yes.

* * * * *

(Testimony of G. T. McLean.)

Q. I will ask you to note accurately the high water line of Sand Island as it projects through that middle of the sands, and we may fairly say that it is the middle of the main bulk of the sands, may we?

A. I don't think I understand that question.

Q. I mean that line goes a little bit westerly of the middle of bulk of the sands. You understand that?

A. That is right."

Now, that measurement on the 1920 map shows a distance of 1100 feet from this cross to the high water line on the southwest edge of Sand Island, and a distance of 6700 feet from the southerly point of location to the northerly high water mark of Sand Island.

Counsel for defendants made the observation at this point:

"We didn't deal with the north shore line up in the Bakers Bay area, which is a long way from the premises in controversy. We only dealt with the recession of the south shore line.

Mr. HICKS: The witness testified he was showing the recession of the island." [212]

Taking the map of 1926 and measuring from the same point, the southerly shore line of Sand Island is 2100 feet distant as compared with 1100, as before testified, and the northerly shore line of Sand Island is 6800 feet distant.

(Testimony of G. T. McLean.)

The direction of the recession of the south shore of Sand Island was northerly and the west shore of Sand Island was easterly. You could not have definitely established that point, or any particular point on the island, unless you gave measurements both ways or tied it into some particular fixed line. It is not true that it would be necessary to form a right angle to accomplish the correct measurement of the recession eastward and westward. To draw an east and west line through one point of the island, or to measure all points of the island from an east and west line, or to measure all points of the island from a north and south line will not establish and measure the true movement of the shore of the island unless you take all points and measure all of them in both directions and make your comparisons in both directions. If you want to measure the entire shore line of the island the best way is to graphically show on tracing paper or tracing cloth that you can see through and you will get a correct picture of the entire shore line with each comparison. I could make such a tracing.

At this point it was agreed that the witness would later make and produce a tracing of the character mentioned.

The survey I made in 1928 and platted in red outline on the 1934 map was made at the request of Burke Packing Company, who had applied to the Oregon State Land Board to obtain a lease of the sands and had been informed by the Board that a

(Testimony of G. T. McLean.)

survey giving description by metes and bounds must be presented to the Board before bids were called for lease. I [213] personally made the survey at the time. In stating channel depths in my previous testimony I stated the greatest depth as well as the least depth. I intended to include the maximum and minimum channel depths as characteristic. These calculations were not roughly made, but deliberately to show the characteristic soundings.

“Q. For the year 1929, I will ask you to step down here and note the same calculation for that year now.

A. In 1929?

Q. Yes, sir.

* * * * *

Mr. HICKS: Why, it is the depths of the north ship channel at the southerly side of Sand Island. It is the one he testified to yesterday in this regard.”

Reading them all through the thread of the channel as it appears on the map of 1929, I don't remember how far I went yesterday, but I probably read them as 12, 14, 15, 9, 6, 5, 12, probably in that manner.

I testified concerning the location of some docks but I did not make the surveys for them. I don't know if any surveys were made. The piles of one dock are still there; the piles of the last dock are still there. I made a survey to fix the locations where

(Testimony of G. T. McLean.)

these docks had been constructed. I don't know whether the piles of the first dock are there or not, but in previous work on Peacock Spit I made notations of where that particular dock was. I do not know when the third dock was constructed. I do know when the other two were. I think I testified as to the third dock that I didn't know when it was built, but I knew it was there in 1934 and had seen it. I was on Sand Island in May, 1934, but not in the vicinity of the dock. I was again on the island in August or early September, and did see the dock.

[214]

"Q. While you were on the island in 1934 did you observe any fishing activity on there?

A. No.

Q. Sure of that?

A. Sure."

Redirect Examination of Mr. McLean

The Burke Packing Company, at whose request I made the survey in 1928, carried on fishing operations at that time in the Lower Columbia and up towards Skamokawa. I think it has gone out of business. It did not get the lease on the sands I surveyed at that time when they were put up for public bidding. It was not the successful bidder.

Neither Mr. Barbey nor the Columbia River Packers Association had anything to do with the making of this survey, and knew nothing about it.

(Testimony of G. T. McLean.)

Recross Examination of Mr. McLean

Q. Referring to Defendants' Exhibit 9 (see page 94 supra) [see page 210 of this printed transcript] the description therein contained is identical with the area enclosed in the heavy red lines on the 1934 map south of Sand Island, allowing for irregularities or errors which might occur in the width of pencil lines and things of that kind. The description ties to a section corner located on the Oregon mainland south of the Fort Stevens Military Reservation, also to various engineers' service stations that are on Sand Island and on Cape Disappointment. It is not true that if Sand Island had moved or receded that the description would be in error. In addition to being tied to the monument on the Oregon mainland it is tied to other monuments which are still there, and is also tied to the lighthouse at Cape Disappointment, and in my opinion it is accurate. [215]

Redirect Examination of Mr. McLean

Referring to the description in Exhibit 9 and to the area circumscribed by red lines south of Sand Island on the 1934 map, that area does not include any accretions but only includes the metes and bounds description of the area as surveyed and platted by me in 1928. Of course the red lines surrounding the area referred to do not give the metes and bounds. The metes and bounds description appears in Exhibit 9. The red lines merely mark the exterior boundaries of the area as surveyed in 1928, and do not, of course, take into account accretions.

(Testimony of G. T. McLean.)

Recross Examination of Mr. McLean

The area in red does not purport to show what land, if any, is above high water. It shows the land above low water.

At this point the witness was excused, with the understanding that he would make a tracing showing the location of the southerly and westerly shore of Sand Island as shown on the map of 1920, and a tracing of said shore lines as shown on the map of 1934, in order to show the extent to which said shore lines had receded or eroded during said interval.

[216]

W. G. BROWN

witness for defendant, testified:

I am a Civil Engineer, residing in Portland, having practiced my profession since 1889. From 1894 until 1906, I was employed by the United States Government, largely on the Columbia River. Since leaving the Government employ, in 1906, I have followed my profession, largely along the Columbia River, for myself and other parties practically up to this date. In 1894 I worked at Fort Canby on survey, and that winter at The Dalles, and from the winter of 1894 until 1903 I was on the construction of the Cascade Locks. I had charge of the work from 1897 to 1903. At the completion of this project I went to the mouth of the river on jetty work, and in 1904 and 1905 I had charge of constructing gun

(Testimony of W. G. Brown.)

emplacements at Fort Canby, which is on the North side of the Columbia River at Cape Disappointment, about a mile from the present location of Sand Island. I actually lived there from the summer of 1904 until the spring of 1906. I became familiar with the area South of Cape Disappointment, designated as Peacock Spit on the maps and the area easterly thereof, known as Sand Island. I made surveys there and studied the maps of other surveys from the earliest survey made by Admiral Vancouver, I believe in 1792.

On the earliest official map made by the United States, Sand Island was at least two miles south of where it is at the present time. Its origin was the cutting off of the tip of the South sands known as Clatsop Spit on the Oregon side. These sands grew out into the river until they obstructed the flow to such an extent that the current cut Clatsop Spit in two, and the severed part became Sand Island. At that time, what was later called Sand Island was called "Sands" or "breakers", but a few years later it became known as Sand Island. I believe it was so designated for the first time about 1839. Then as Clatsop Spit again grew out into the river, the current shoved this shoal North, and it gradually was pushed [217] further and further to the North until it finally reached its present location. This is shown progressively in a number of different maps the Government published.

(Testimony of W. G. Brown.)

The map of 1870, included in Exhibit 1, is one of the charts showing the location of Sand Island in various years. West of Sand Island, until the jetties were constructed, was a body of shifting sand, known as "Middle Sand" and on the North is Peacock Spit and on the South is Clatsop Spit. In the earliest maps what is now called Peacock Spit was called "North Breakers" or "North Sands", and after the recovery of the ship "Peacock" it was called Peacock Spit. It was a separate sand from Sand Island and its original location was at least three miles from Peacock Spit, at that time. In the earliest times Peacock Spit laid South and West from Cape Disappointment but it never lost its identity of being a spit connected with Cape Disappointment; sometimes it was detached at high water, and even at low water, but that spit always existed from the first maps that we made and was always connected with Cape Disappointment, although on some of the maps there was intervening water of varying depths. In the map of 1851 Sand Island was at least two miles away from Peacock Spit South and East. I am giving the distances roughly. There is no difference in the material out of which Peacock Spit is constituted, or from Sand Island; both are beach sand. The South jetty was finished, I believe in 1895; I went there in 1903, when the extension was begun. The North jetty was finished, I believe in 1913. The South jetty cut across Clatsop Spit.

Taking Exhibit 1, beginning with map of 1917,

(Testimony of W. G. Brown.)

the movement of Peacock Spit and Sand Island may be described as follows: On the 1917 map a considerable portion of Peacock Spit is above low water, with a portion detached and a portion attached to Cape Disappointment. Peacock Spit consisted not only of the area shown above low water and above high water, but also a large base of sub- [218] merged sands shown on the map and these points shown on the map are merely the surface manifestations of the area above low water. The map shows no boundaries of this large base, except on some of the older maps, carrying 16 to 12 and 18 feet contour lines, 18 feet being line where navigation became affected, and when weather conditions permitted, soundings closer into shore,—the maps show the conditions. Taking the meridian line on the maps marked 124-02, the Western shore of Sand Island in 1917 was from 700 to 1000 feet West of this meridian line and taking the latitude line 46-16 North, Sand Island projected about the same distance South of this latitude line, and Peacock Spit was about 1500 feet East, almost on a line with the most Easterly projection of Camp Disappointment. In 1918 Sand Island had moved somewhat to the Westward, with a greater area West of the meridian line 124-02, and the spit had also moved Westward, as well as a large detached portion of it which had moved towards the North jetty. The 1919 map shows the spit had enlarged and the detached portion had joined with the remainder. This whole

(Testimony of W. G. Brown.)

area from Cape Disappointment had become one contiguous area. In the 1920 map the spit is still connected with the high land, with the lagoon directly South of Cape Disappointment.

The 1922 map shows that Peacock Spit had moved considerably to the Eastward, with a hook tending over towards Sand Island; there was a 22-foot channel, a little deeper between Sand Island and the spit; the spit has not changed, except Sand Island has cut away along Southwestern shore and there has been a recession Eastward of Sand Island, and during this period Peacock Spit has been extending towards Sand Island. In 1923 the sands of the spit had joined and the channel between Peacock Spit and Sand Island is becoming shallow. Peacock Spit is solidly joined with the high land and Sand Island is still receding. The beach on the West shore of Sand Island, on these various maps, varies; at times it is long and [219] sloping, and at other times abrupt, according to how fast it is receding. On the map, with a small scale like this, it is impossible to say just what the distance is, but generally these maps show an abrupt beach on the West and Southwest side of Sand Island, the side towards Peacock Spit. On the 1924 map, the spit is shown to have enlarged considerably. We can tell this growth by referring to the latitude and longitude points, which, on the 1923 map, are in the channel. In the 1924 map the spit is extended from the Westerly until now it is over 1000 feet Easterly

(Testimony of W. G. Brown.)

from that point towards Sand Island. On this map the spit is connected with Cape Disappointment. On the 1925 map, Peacock Spit shows a portion above high water, although the highest part is not connected directly with Cape Disappointment at the lighthouse, but does connect at the jetty. The channel between Peacock Spit and Sand Island is not materially changed, and Sand Island, I would say, is receding slightly.

The 1926 map shows practically the same condition. The channel is pushed right over against Sand Island. There are sands next to Peacock Spit, but detached at low water mark, and between these sands and Sand Island the soundings in the channel are from 16 to 20 feet deep, while between this detached portion and Peacock Spit no soundings are shown, so it is an extension of Peacock Spit. Peacock Spit is now nearly three thousand feet East of that point on 124-02 longitude. On this map Peacock Spit shows no area above high water.

On the 1927 map the high water line again appears on Peacock Spit. These maps do not purport to show the distance of the land above high water, or the depth of the water on land below low water, except where soundings are shown. The part of Peacock Spit detached at low water line, has extended on the 1927 map, still further east, and the sand appearing between this and the main Peacock Spit shows that they are practically all one body of sand. This is conclusively shown by the sound-

(Testimony of W. G. Brown.)

ings between the spit and Sand Island where we have 15, 13, 10 feet, and no soundings between Peacock Spit and the detached area. [220]

On the 1928 map Peacock Spit is still shown as being above high water. The detached sands to the Eastward are shown as similar but there are no soundings between the detached portion and Peacock Spit, while there are soundings showing 17 feet of water between these areas and Sand Island. Sand Island has in the last four or five years receded gradually to the Eastward.

The 1929 map shows a large portion of the spit is broken up, and for the first time soundings appear across it. The spit is now in seven or eight areas, above low water, with one area above high water, detached from the mainland, at Cape Disappointment. Sand Island has receded gradually to the Eastward of the latitude 46-16 and is bounded on the West by a channel of 14 or 15 feet.

In the 1930 map, a channel apparently exists between two portions of Peacock Spit, which is now very much more consolidated than the year before and there are no soundings in the crossing channel; apparently the channel is shoaler. A portion of Peacock Spit, down to low water line, has extended considerably to the East; it is now nearly 3400 feet East of our latitude and meridian point we have been working from. The soundings in the channel between the spit and the island now show less at certain points, although there is still 12 feet of

(Testimony of W. G. Brown.)

water at one point, and 8 at another. The shoalest crossing between Peacock Spit and Sand Island is 4½ feet. [221]

“The 1931, the spit, or the—yes, the spit, is about the same shape as it was the year before, but the detached portion above the high water line has disappeared and the portion above high water line attached to the Cape is very much smaller than it was before. The spit is wearing away somewhat to the westward, although not greatly from the last year—it was at that time about the same—but the channel crossing the spit shows no soundings at all, which would indicate that it was shoaler than the year before, both channels much shoaler.

“The 1932 shows the same condition, but there are no soundings shown in either channel. The channel between the point of the spit and Sand Island is now very narrow and extends so far to the east that apparently there must be a cut opened to relieve the water from Baker’s Bay. It couldn’t be maintained in its present condition very long. Now we have the end of the spit as over 5,000 feet, over a mile, beyond our latitude-longitude point, and Sand Island receding to the east.

“1933, the channel between the spit and the island has been choked up at the upper end, and at low water this portion of the spit is now connected with Sand Island. The soundings

(Testimony of W. G. Brown.)

across the spit are now shown on the middle channel that we have observed the last several years and now show depths, the shallowest 7 feet, 6 feet at one point, other surroundings up as much as 13 feet. All of the spit that was above high water line has at this period been flattened down until no portion of it was up 8 feet or more above low water. It had got to low water.

“Now, in 1934, we have—in 1934 the lower end of the spit has extended still farther to the east, and it is now—well, it is nearly a mile and a half,—it is a mile and a quarter, we will say, east of our meridian point.

Mr. HICKS: So the record may be clear, you are referring to these sands south of Sand Island, you are calling them “the spit”, the ones that are attached to the island?

A. I am calling them “the spit”. They are now attached to the island at one point, and that point in 1934 is not as—that juncture of the island is not as wide as it was the year before, in '33; it is narrower. That lagoon, as it has now become, still empties into the channel at the lower end. There is no part of the spit now shown as above high water line, except close in to the jetty, at the inner end of the jetty.

1935, this extreme southeasterly, east tip of the sands, which I should say are a part of Peacock Spit—they are now indicated here as

(Testimony of W. G. Brown.)

“sands”—has moved a little—I don’t know whether it has moved any to the east or not, it is so near to what it was—apparently it has, moved eastward. The portion of Sand Island where these sands joined it has raised until a hook is shown there above the high water line. The rest of the sands comprising Peacock Spit, there’s a small portion next to the jetty and a small area—no, it isn’t so small, either, except on this small map; it is over a mile from east to west—there is a flat portion that is above highwater at this time, extending eastward from the Cape. Apparently there is a tendency of the sands to build to the south the last year or two, although one would have to compare that by measuring them. [222] It is very decidedly an extension to the south since 1933, though, both in ’34 and ’35, the sands extending south.

Q. (By Mr. Bowerman) Mr. Brown, will you locate as accurately as you can on the map the point where the Peacock Spit sands show a junction in 1933 with the Sand Island, and then compare that point with the—oh, say, 1920 map of Sand Island, and state whether or not the point—how far the point of junction is from the location of the western shore of Sand Island in the earlier map.

Mr. HICKS: Now, I object, Your Honor, to the use of the words “Peacock Spit sands”, for the purpose of the record here. Let the witness

(Testimony of W. G. Brown.)

identify the sands he is going to use here and not use that term. It is confusing in the record.

The COURT: The question assumes——

Mr. HICKS: Yes.

The COURT: ——assumes the location of Peacock sands.

Mr. HICKS: Yes.

Mr. BOWERMAN: Just a minute,——

The COURT: Of course, if the witness testifies that he is familiar with and knows where Peacock sands is at and locates it, then the question is proper, but I think it is well taken at this time, because the witness has not himself located and stated that he knows where Peacock sands are located, and your question assumes that he does.

Mr. BOWERMAN: Well, I have this to be said in my favor, Your Honor, I have the authority of the United States maps. It is marked plainly on here “Peacock Spit”.

The COURT: Marked on the map as such?

Mr. BOWERMAN: Up to 1932, I think, or such a matter.

Mr. HICKS: May it please the Court,——

Mr. BOWERMAN: Back to 1920 here, 1919—not '18, but 1919, 1920, '21, '22, '23, '24,——

The COURT: Well, couldn't you modify your question and state “as shown from the map”? He would be then testifying from the map, unless he knows himself from independent

(Testimony of W. G. Brown.)

knowledge where Peacock Sand is at. If he does, you may inquire in the matter.

Q. (By Mr. Bowerman) Well, do you know where Peacock sands or Peacock spit is?

A. I was on the ground last in either August, the last of it, or early part of September.

Q. And over what period of time were you on the area designated on the map as "Peacock Spit Sands"? [223]

A. As long as we could stay for the tides.

Q. No, I mean back over what period of years?

A. Well, I was on the grounds in '29 and '30, and prior to that time I couldn't say, but I made frequent trips down there in connection with my work.

Q. What is that area that is marked on the map as "Peacock Spit" known locally down there as?

A. Well, it is known as Peacock Spit.

Q. Is that the local name for it?

A. That is the local name for it.

Q. And is that what it is generally known as on United States Engineers' maps?

A. Yes, and so designated on the maps since the wreck of the "Peacock".

Mr. HICKS: Now, for the purpose of the record, so that I may have this clear, you are referring to this consolidated body of sands which are connected with the mainland, are you not?

(Testimony of W. G. Brown.)

A. Sometimes connected and sometimes not. They are connected at certain depths, not always at high water or even at low water.

Mr. HICKS: You are not referring to the sands that have been cut through and broken up by storms, you are not referring to the sands east of that, as Peacock Spit?

A. Yes, I consider that channel simply a temporary channel, probably close up in a few years, and that the whole mass is Peacock Spit, subject to changes from winds and tides from year to year."

The junction of the sands which I have referred to as Peacock Spit shown on the 1932 map, or the point on the westerly shore line of Sand Island where this junction occurred, is about 2700 feet north of our meridian line and about 1500 feet easterly of where the westerly shore line of Sand Island was as shown on the map of 1920. That shows that there was a recession of the westerly shore of Sand Island from the area of high water of about 1500 feet easterly between 1920 and 1933.

Cross Examination

When I speak of a recession there of 1500 feet, I am referring to the cutting off of this nubbin which sticks out there from the westerly [224] side of Sand Island. I note the body of sands appearing on the 1879 map extending southerly from

(Testimony of W. G. Brown.)

Cape Disappointment which I have referred to as Peacock Spit. There are no soundings. I also note the large body of sand extending due west and projecting from Sand Island which would be a spit of the same character. I estimate it extends out a couple of miles. It is attached to Sand Island and circumscribes it on the westerly end. The progress of Sand Island northerly and westerly was completed in 1905 or prior thereto because the channel had been stabilized by the jetty. Since that time certain portions have moved to the north but at nothing like the rate at which it had been moving before that time. The more southerly ship channel is about in the same location that it was in 1908. It has of course deepened and widened. A considerable portion of Sand Island occupies the same location that it did in 1908. I was down in that section in 1929. I made some surveys at that time and I am familiar with the shifting character of the sands and spits in the estuary of the Columbia. A heavy storm changes channels and bodies of sand on short notice. Storms, such as they have during the winter months, may affect substantial changes. This could only be said relatively because of the smaller channels where there is no great amount of navigation. A normal winter storm, such as you referred to, and with reference to the situation shown on the 1929 map would be more apt to change shore lines than a channel. Where there is a lot of detached portions a storm might cause perhaps a shifting from one

(Testimony of W. G. Brown.)

side of a body of detached sands to another. I have seen heaving storms make changes during the two winters I spent there. The major channel don't change now. It did before the jetties. At times there were as much as a hundred million yards change in one year but that had to do with the bar. The sands more or less protected by the outer sands didn't change so much. The channels have not changed relatively nearly so much since the jetties were built as before. Comparing the map of 1928 with the [225] map of 1929 I find that, in 1928, there were small bodies of sand above high water not cut off and there were several detached portions. In 1929 it had flattened off. There are soundings in but one channel. It is the practice of the Army Engineers to chart any channel that could be used by boats. In 1929 the channel which had broken through Peacock Spit shows a maximum depth of 7 feet and a minimum of 4 feet. The channel between the Spit and Sand Island shows a maximum of 15 feet, in the middle 11 feet and at the upper end it gets down as low as 5 feet. The shape of Peacock Spit is substantially the same on the map of 1931 as on the map of 1930. There was some changing and cutting away and some consolidation of detached area. Comparing the map of 1930 with that of 1931 the channel lying immediately south and west of Sand Island and between it and the body of sands lying to the south had pushed eastward and had become shallower. I can't tell whe-

(Testimony of W. G. Brown.)

ther the same tendency is shown by the map of 1932. There are no soundings but the channel is narrower. The 1933 map shows that these sands to the south and west of Sand Island have jointed with Sand Island.

“Mr. HICKS: Yes. Now, you said something about the action that the waves and storms and currents have upon the shore lines of these islands and spits. Will you amplify that a bit more. What is the tendency there? What happens when a storm strikes one of these spits or shallow bodies of sands in this vicinity?

A. A heavy storm will sometimes blow up the sands and sometimes cut them down. It depends on the stage of the tide. On an ebb tide with a very heavy break on the bar, which does not now exist but did when I was down there, it would build these sands up materially, if the heaviest part of the storm was on the flow tide. If on the ebb tide it might carry that stuff out with it and leave quite a hole. You can't state that a storm will have a certain result. There's too many—the direction of the wind, the intensity of the wind.

Q. The wind has quite a bearing on the effects on the shore?

A. The wind makes the waves and the waves is what does the damage.

(Testimony of W. G. Brown.)

I observed at one time quite a piece of Sand Island being cut away, that is, the high water mark being pushed back, but later on in the springtime when I was over there there was a large beach developed there. Now, I couldn't say whether that [226] occurred at the same storm or later. You don't have any opportunity to watch those things. It might well be possible for the shore line of one of those spits to change as much as a hundred feet in the same storm. Anywhere along the beach I have seen great portions of land torn out and rebuilt. Wherever you have an alluvial soil or sand beach, during storms they are subject to change, and this condition is found in the entire region at the mouth of the Columbia River." [227]

HARRY PICE,

a witness for defendants, testified:

My home is in Astoria where I have lived for about 33 years. For the last few years I have been foreman on the seining grounds. Beginning in 1928, I was employed by the Columbia River Packers Association and afterwards by Columbia River Packers Association and Barbey. I became employed by both somewhere around 1929. As foreman I had charge of the seining grounds and the seining operations were drag seining. These seining

(Testimony of Harry Pice.)

operations were carried on on the south side of Sand Island, on the south side of what we call here Peacock Spit.

“Q. (By Mr. Clark) Perhaps you had better come down to the map, Mr. Pice, and that way we will probably locate more rapidly where your operations were being carried on in 1928. Here is Sand Island as outlined on this map, and here is what is outlined on the government map, designated on the government map, as Peacock Spit. Now, on which body of land were you carrying on seining operations?

A. Right in here, from the east end of this here, down here. (Indicating).

Q. Now, you put your finger on Peacock Spit as designated on this 1928 map, did you?

A. Yes, right here (indicating).”

These seining operations were carried on on the southwesterly side of Peacock Spit and out towards the easterly end (indicating). I should say somewhere about here (indicating). That is I figure about three thousand feet from the extreme end.

[228]

“Q. Well, now, you have got your finger on the eastern and southern end?

A. Yes.

Q. Then what direction from there?

A. Westerly.

Q. Yes, up along the spit?

A. Yes.”

(Testimony of Harry Pice.)

The drag seines were laid out in the waters on the ocean side. There were buildings on the spit close to the seining operations, consisting of a fish dock, mess house and barn and other structures, in 1928. These buildings were about here (indicating) with reference to the fishing operations. They were located about the center of the sands. The dock extended from the sands into the channel between Peacock Spit and the Island. It was used for unloading supplies brought to the fishing operations and loading fish to be carried away.

In 1929 drag seine operations were carried on by Columbia River Packers Association on Peacock Spit, about where they were in 1928. The seines were laid out in the waters on the ocean side of the spit and we had buildings on the sands used in connection with the fishing operations.

In 1930 I had charge of the drag seine operations on the spit. These operations were carried on about here (indicating on map of 1930) and

“Q. You have located a point approximately where there is an area marked out by a heavy white line? [229]

A. Yes, sir.

Q. On the area marked ‘Peacock Spit’?

A. Yes, sir.”

Boats running between Astoria and Baker’s Bay area during the years I have referred to used the channel between Sand Island and Peacock Spit and very close to Sand Island. I am referring to the

(Testimony of Harry Pice.)

channel shown on the 1930 map upon which depths were charted and which runs close up to Sand Island.

In 1931 I had charge of the drag seine operations which were carried on from the easterly end of the spit and running westerly along the spit. The seines were laid out in the waters and landed on the ocean side of the spit. There was a dock used in connection with the fishing operations which as nearly as I can remember was located a little south of the figures "5" and "6" in the channel between the sands and Sand Island. It was a dock which rested on piling and extended from Peacock Spit or the sands we have been talking about north into the channel between Peacock Spit and the sands. The dock was used to land supplies for the fishing operations and to carry away fish. The boats that came to the docks were what were called the fish carriers—about 60 feet long and about fourteen feet beam and were driven by gasoline engines. They have a draft of about eight or ten feet. These boats approached the dock through the channel between Sand Island and the sands upon which we are fishing. As a rule the boats came from Astoria and when loaded went back to Astoria. Some boats, of course, went through to Ilwaco on Baker's Bay. All the boats which came to our dock or went through from Astoria to Ilwaco used the channel which was between Sand Island and the sands upon which we were carrying on the fishing operations. [230]

I had charge of the drag seine operations in 1932 and

“Q. And where were they with reference to the drag seine operations of 1931?

A. A little higher up, easterly, more easterly.

Q. A little higher up, but more easterly?

A. Yes.

Q. On the same general body of sands?

A. Yes, the same body of sands.”

We did not use a dock that was in connection with the fishing operations. The fish were taken away in scows. These scows would tie up to piling which were driven on the north side of the sands upon which we were fishing at a point approximately south of the letters “L” and “A” in the word “Island”. The point at which the piling were driven was on the south side of the channel between Sand Island and the sands upon which the fishing operations were being carried on, and the scows reached these piling through that channel. The scows when loaded with fish were towed to Astoria.

I had charge of the drag seine operations in 1933 and

“Q. And where were they carried on with reference to the operations of '32?

A. Right in here (indicating), east end of—you see, we worked up every year more. The sands kept working easterly a little more.

Q. That is, the sands kept working easterly?

A. Yes, sir, somewhere about there (indicating).

(Testimony of Harry Pice.)

Q. Building up easterly?

A. Yes, sir.

Q. But did you work along these same sands? [231]

A. Yes, same sands.

Q. And I presume as usual you laid your seines out on the ocean side?

A. Yes."

The fish was gathered in scows the same as in 1932 and were tied up to the same piling as in 1932 which they reached through the same channel, as in 1932, between Sand Island and the sands upon which the fishing operations were being carried on.

I had charge of the drag seine operations in 1934 which were carried on in about the same place as in 1932, perhaps a little further easterly. In the meantime a dock had been constructed on these sands, on the north side of these sands or spit which would be on the south side of the channel between these sands and Sand Island. The dock extended from the sands or spit north into the channel in the direction of Sand Island. It was built on piling and used for the loading and unloading of boats. The boats that came to this dock in 1934 were small, about thirty-two feet long. They came into the channel at a point near the most westerly dike which extends out from the south shore of Sand Island, usually on half tide and then reached the dock through a channel which existed between Sand Island and the spit or sands upon which we

(Testimony of Harry Pice.)

were fishing. When the boats were loaded they went back out through the same channel and also towed the barges or scows out. The fishing operations in 1934 started about June 11 and were carried on until about August 25th. There were no drag seine operations during the fall seasons. It is customary to close down drag seine operations on August 25th of each year. In the spring we usually began somewhere around June 1st to the 10th, depending on the season. [232]

When the fish were landed on these sands in the drag seines, on the ocean side, they were hauled across the sands to the dock where they were loaded. An ordinary type of four wheel wagon drawn by one team of horses was used in the hauling.

In drag seining, one end of the seine would be staked to the land, and the other end, when it came back to land would be dragged up on the sand with horses.

The fish was hauled in a wagon across the sands to the dock after being landed on the ocean side of the beach. The distance in some years would be five hundred feet and some years a little more, and some years less. In 1934 we had about 84 men on the fishing operations referred to and about 32 head of horses.

Cross Examination of Mr. Harry Pice.

I was fishing for the Columbia River Packers Association in 1928 on what is shown on the map

(Testimony of Harry Pice.)

as Peacock Spit, from the easterly end down towards the westerly end. In 1928 Barbey Packing Company was fishing on Sand Island. Mr. Barbey had a separate operation on Sand Island. I can't say how far the Barbey Fishing operations on Sand Island was from the operation of the Columbia River Packers Association, of which I was foreman. I hardly think it was as much as two miles but I never measured it and it is hard to judge distances.

In 1929 Barbey was carrying on an independent operation on Sand Island. I know where the westerly dike is located. I wouldn't say whether the fishing operations carried on by Barbey, to which I have referred, were westerly of where the westerly dike was later constructed. [233] Barbey had two locations there, Sites No. 2 and 3 on Sand Island. They are the ones noted as Sites 2 and 3 on Plaintiff's Exhibit No. 3. The location of the Barbey operation was on Sand Island. It probably extended easterly and onto site 4. I am not able to say whether the 1929 Barbey operation was about a mile and a half from the operation with which I was connected because I never measured the distance.

In 1930 I was working for the Columbia River Packers Association on Peacock Spit and the fishing operation began about the easterly end of what is designated on the map as Peacock Spit and extended westerly along the south shore. It might

(Testimony of Harry Pice.)

have been a distance of a couple of thousand feet—some years it was shorter and some years longer. I think Barbey was fishing on Sand Island in 1931. I am not sure. I think there was only one operation in 1931.

“Q. Now, in 1931 where were the constructions up here on the main body of the island, if there were any? I mean up across from the channel there.

A. There wasn't any.”

There was some piling driven in the sands on the north side of the sands which were used to moor scows. We did not carry the fish across the Island.

In 1928, as to the fishing operations carried on on Peacock Spit we received the fish on the south side of the spit and took them across the spit to the north side and from there through the channel to Ilwaco or to Astoria. It was the same in 1929. [234]

In 1932, the drag seine operations began to go farther to the east and by 1933 and 1934 we were fishing westerly from the last dike which had been constructed there. From 1930 on I was working for both the Columbia River Packers Association and the Barbey Packing Company. I know nothing about the Baker's Bay Packing Company.

In 1934, we went into the channel between Sand Island and the sands upon which we were fishing at about half tide because the channel was shoaling up a bit.

(Testimony of Harry Pice.)

The sands of which I am speaking south of Sand Island would not be flooded with water during high tide in the summer time. I should say about half would be flooded at high tide. We are not troubled in the summer with swells and very high tides. There would be no tides in the summer that would cover these sands. There were no tides in 1934 that covered the sands because we had buildings on there. I was on these sands until August 25, 1934. I have not been on them this year (1935).

Redirect Examination of Harry Pice.

During the fishing season of 1934, we kept the men and horses in the buildings on the sands.

“Q. You had buildings on the sand, and the horses were kept there?

A. Yes, a cook house and a barn.

Q. And the men were kept there, except when they went ashore Saturday night?

A. Yes.” [235]

A. J. GOULTER

a witness for defendants, testified:

I live about three miles east of Ilwaco, Washington, where I have lived practically all my life. I run a ranch down there and furnish horses for seining purposes. I am acquainted with Mr. Barbey, also with Mr. Thompson of the Columbia River Pack-

(Testimony of A. J. Goulter.)

ers Association, and have furnished horses in connection with their seining operations.

I furnished horses in connection with their seining operations. I furnished horses in 1928 for the Columbia River Packers Association, probably about 80 head for use in drag seine operations. The first time I furnished any horses to Mr. Barbey was either in 1930 or 1931.

In 1928 I furnished horses for seining purposes to Columbia River Packers Association on the sands that were referred to by Mr. Pice. I furnished 32 horses for this operation. They were taken over to the fishing grounds in a scow. The scow went through the channel between the spit and Sand Island. I was at these fishing operations during the summer of 1928, during all of the time my horses were there. I refer to the drag seine operations of which Mr. Pice testified. The horses were kept in a barn on the sands. There was a dock. It was built on the spit extending out into the channel between the spit and Sand Island.

I furnished horses also in 1929. I also furnished about 32 horses to be used in the drag seine operation referred to by Mr. Pice. The operations began sometime in June and ended August 25th. The horses were kept on the sands in a barn. There was a dock used in connection with the operations which extended northerly into the channel between the spit and Sand Island. Fish carriers and other boats came to that dock through that channel. There was

(Testimony of A. J. Goulter.)

also located on the sands upon which the fishing operations were being carried on other buildings such as a cook house, bunk house, etc. The fish [236] were landed in nets on the ocean side of the spit and carried across the spit in wagons to the dock.

I furnished about the same number of horses during the same period for the operations in 1930. The horses were kept on the sands in the same way as in preceding years and there was a dock used in connection with the operations which extended from the spit northerly into the channel between the spit and Sand Island and this dock was approached by several boats which carried supplies to and fish away and these boats used the channel between the spit and Sand Island.

I also furnished horses for the fishing operations in 1931.

In 1932 the horses were kept in buildings on Sand Island. These buildings are on the north or Baker's Bay side of Sand Island and have been there quite a number of years.

The first buildings were put in there in 1921. The buildings were on the north shore of Sand Island and the point I have indicated as the location is approximately on a line drawn from the letter "d" in the word "Island", on the 1933 map, easterly to the figure "4" out in the waters north of the Island.

I furnished horses in 1933 for the fishing operations of which Mr. Pice spoke. This year the horses

(Testimony of A. J. Goulter.)

were kept on the sands on Peacock Spit. They had some scows that took them over.

In 1934 I also furnished horses for the seining operations of which Mr. Pice spoke. This year the horses [237] were kept during the operation in a barn on Peacock Spit. The bar was on the north side of the sands and they fished a little to the west and south. The fish when taken in the nets on the ocean side of the sands were carried this year as in previous years in wagons across the sands to the dock built from the sands north into the channel between the sands and Sand Island. Supplies reached the fishing operations by way of this dock. The channel I refer to is the one between Peacock Spit and Sand Island. Fishing operations in 1934 closed in August 25th.

I did not furnish any horses in 1925.

Cross Examination of Mr. A. J. Goulter.

When I furnished horses to Columbia River Packers Association in 1928 it was fishing Peacock Spit. I am not furnishing horses to Mr. Barbey for fishing operations on Sand Island at that time. I am not able to say how far the operation of Columbia River Packers Association on Peacock Spit was from the operation of Barbey on Sand Island. I never measured the distance. I could see the men working on Barbey operation. I am not able to say whether these two operations were as much as two miles apart. I should say maybe between one and one-half and two miles in 1928. Of course the distance varies. In 1929 Mr. Barbey was fishing the sites on Sand Island and the Columbia

(Testimony of A. J. Goulter.)

River Packers Association was fishing on Peacock Spit at the location that I have already described. [238]

I began leasing horses to the Columbia River Packers Association and Barbey combined either in 1930 or in 1931, I am unable to say which, but I was still furnishing horses for the operation on the spit as I had before.

“Q. (By Mr. Hicks) In 1931 and '32, when you were furnishing horses for the companies combined, they were fishing the identical premises and the identical locations at that time that Mr. Barbey was fishing in 1928 while the Columbia River Packers Association were fishing away over on Peacock Spit; is that right?

A. No.

Q. Well, now you just explain the difference.

A. Why, I don't think there were any operations carried on on Sand Island after '31. That is my recollection of them.”

I know where the dikes are. I know where the westerly dike is. I furnished horses for the operation of Columbia River Packers Association on Peacock Spit in 1928.

In 1928 the Columbia River Packers Association were fishing off Peacock Spit and Barbey was fishing off Sand Island.

“Q. (By Mr. Hicks) Well, you testified

(Testimony of A. J. Goulter.)

that the operation in 1928 of the Columbia River Packers Association was about between one and two miles from where Mr. Barbey was fishing at the same time.

A. That is—What? One and two miles from where?

Q. Between one and two miles, the way you put it, between the point where Mr. Barbey was fishing in '28 and where the Columbia River Packers Association was fishing during the same year. [239]

A. They were fishing on Sand Island and we were fishing on Peacock Spit laying down in front of Sand Island."

* * * * *

"Q. (By Mr. Hicks) Well, maybe I can make it more clear to you. I will ask you again if the premises that were fished by the combined companies in 1931 and '32 and '33,— I ask you if those premises were not the identical premises, as to the location on this map, that were fished by the Barbey Packing Company in 1928?

A. No, not the way I see it.

Q. Well, can't you look at the map there and point out any difference in the location?

A. Well, no, in 1928 the Barbey Packing Company was fishing Sand Island, land on Sand Island, and we were fishing on Peacock Spit."

* * *

(Testimony of A. J. Goulter.)

“Q. A drag seine operation, that is, the fishing operation, could never be carried on in one of the inner channels, is that correct?

A. Well, the drag seine operation is conducted where they can catch the fish.

Q. And they never catch the fish in one of these channels, do they?

A. In Peacock Spit we always fished on the south side.”

I am not able to say whether any of the fishing operations on Peacock Spit and Sand Island were carried on in the waters of the channel. Wherever the fish is that is where they are going to fish of course. I do not know of any drag seine operation being carried on in one of the inner channels. I [240] have seen them fish behind spits. We fished on Sand Island behind the spit and landed inside the spit. In years gone by there were times when we landed on the inside of the spit and since 1928 there was a time when Peacock Spit overlapped Sand Island.

“Q. And the seines would not be dragged in this area, referring to the 1928 map, would not be dragged in the channel between Peacock Spit and Sand Island, would they?

A. No; they might lap in here a little bit, but not a great deal.”

Redirect Examination.

In the fishing operations on Sand Island they might stay out in the channel between Sand Island

(Testimony of Christ Hansen.)

and the sands and land the seines on Sand Island in the Sand Island operation. [241]

CHRIST HANSEN,

a witness for defendants, testified:

I live at Chinook, Pacific County, Washington, where I have lived about 38 years. It is on the north side of Baker's Bay area. My occupation for a number of years has been fishing in the waters of the lower Columbia river including those in the vicinity of Sand Island and the areas marked on the map as Peacock Spit.

I know where the fishing operations of the Columbia River Packers Association and Mr. Barbey were carried on in 1934. I was at those operations once during July or the latter part of August. I reached the operation at that time in this manner: I took my gasoline boat and went over to the north side of Sand Island and tied up to a dock there and walked across the Island and then I had Mr. Goulter come across in a dinghy or small row boat to Sand Island and take me over to the spit where the fishing operations were being carried on. I landed on the spit close to the bunk house. I was there two or three hours. I noticed a body of water between Sand Island and the sands upon which these fishing operations were being carried on. At that time we called it a lake or lagoon. This lake

(Testimony of Christ Hansen.)

or lagoon is a part of the old channel which was between Sand Island and Peacock Spit or the sands upon which the fishing operations were then being carried on.

These sands were called Peacock Spit at the time I first fished on them in 1920-21.

Cross Examination.

Referring to the 1920 map I was on the sands known as Peacock Spit as early as 1919 or 1920 and in the Spring of 1920 and 1921. [242]

When I made the trip in 1934 to the Barbey and Columbia River Packers Association fishing operations, I went across from Sand Island to the sands upon which they were fishing in a small boat across a channel. I said it was about something like 60 feet wide. I couldn't say. The tide was out and it was low water at the time. It was in the afternoon, probably 2 or 3 o'clock in the afternoon. It could have been as late as 4 o'clock, I made no memo at the time. It was pretty good seining tide and I was figuring on I might get some fish. But I wouldn't say just what time it was in the afternoon. I know it was in the afternoon. The crew had just had their lunch but that is hard to go by as on the seining grounds they have lunch most any time of the day. It wasn't a low going out tide, it was a hold up tide at the time. I came in just about at low water. There was a small scow in there at the time. I did not see any salmon taken out of there

(Testimony of Christ Hansen.)

that year because I was only there once and at that time they were just going out fishing. When I came back from the seining grounds I had to again go across the channel of the lagoon to Sand Island and I got a man to put me across. There was a net rack, there must have been a dock and they were all on pilings. I wouldn't say as to the kind of buildings or whether there were any, because I don't recall. There was some kind of a floor construction on top of the piling. I was back there last week and saw some piling but did not see any dock. [243]

WAYNE SUOMELA,

a witness for defendants, testified:

I live at Ilwaco, Washington, where I have lived for about 39 years. Since 1928 I have been local agent of the Columbia River Packers Association at Ilwaco. In connection with my duties as local agent I have been many times at the fishing operations of Columbia River Packers Association.

In 1928 I made a number of trips to the fishing operations on Peacock Spit referred to by Mr. Pice, whom I know. I would go down there to find out how the fish were running and give an estimated report to the Astoria office. In making these trips I used a gill net boat for several years and during the last few years I have used a small boat with an outboard motor. The gill net boat is 27 or

(Testimony of Wayne Suomela.)

28 feet long and is power driven. I have been on the fishing operation described by Mr. Pice every year up to and including 1934. I recall where the channel was with reference to these fishing operations. It was on the northerly side of the sands or what we call Peacock Spit and between Peacock Spit and Sand Island. In my various trips down to the fishing operations I saw boats passing through the channel. The type of boat that they used to carry the fish away from these operations was a fairly good size cannery tender. It might have been between fifty and sixty feet in length. These boats would approach the dock through the channel between Sand Island and the sands to the south and west referred to as Peacock Spit and on which the fishing operations were being carried on. [244]

“Q. Now, in 1931, if you will approach this table where the maps are spread out—you will observe on this map there is but one charted channel westerly of Sand Island leading into the Baker’s Bay area, and that is the channel between a body of sands and Sand Island. Those sands south and west of the channel referred to, are those the sands you referred to as Peacock Spit?

A. Yes, this here area in here (indicating).

Q. And do you know whether or not that was the only channel, so far as you have observed in 1931 and prior years, that was used by boats?

(Testimony of Wayne Suomela.)

A. By cannery tenders, yes.

Q. By cannery tenders. There is this cross-cut appearing across the spit in 1931, but it is not charted for 1931. Now, that is true of 1930. Now turn to 1932, and that channel between the sands and Sand Island is not charted on this map, neither is the cross cut channel; there is no channel charted that year in this area. Do you recall which channel was used by the boats that year in reaching the operations, carrying the fish off from the operations in 1932?

A. Between Sand Island and what was called Peacock Spit."

The sands that I have been referring to as Peacock Spit are those south of Sand Island. I have always heard them called and known as Peacock Spit and the channel I refer to is the channel between these sands that I have called Peacock Spit and Sand Island. It was used in 1932 and again in 1933. I observed that in 1933 there had been a juncture to the north of these sands with Sand Island and at this point to the north of the channel between these sands and Sand Island was closed up. However south of this juncture there still remained the channel [245] through which boats reached the dock on the sands and carried out fish. This channel led eastward or south eastward between the sands and Sand Island to a point about at the westerly dike.

The same condition prevailed in 1934.

(Testimony of Wayne Suomela.)

Cross Examination.

I have been agent for the Columbia River Packers Association since 1928 and am its agent now. I have talked some about this matter with the attorneys for the defendants and with Mr. Thompson and Mr. Barbey.

“Q. Who was it told you to designate these sands lying south of Sand Island as Peacock Spit?

A. I did, as I have always known them to be Peacock Spit.”

I am 39 years old. When I was a small boy, according to history, there was a bunch of sands extending out from Cape Disappointment that was known as Peacock Spit. I have seen the breakers and I have seen the sands out from Cape Disappointment and I have heard them called Peacock Spit. Those were the sands I heard called Peacock Spit since I was a little boy and I have also heard them called that further on up the river as they extended further up.

I have never worked for the Barbey Packing Company. I didn't know that the Columbia River Packers Association by virtue of a lease from 1930 on were working the sands in dispute.

I am telling the court that the sands lying westerly of the dike and southerly of Sand Island were known to me through the years from 1930 on as Peacock Spit. I have never heard anybody call them Sand Island. I have heard that there were

(Testimony of Wayne Suomela.)

drag seine operations on Sand Island in [246] 1930, 1931 and 1932. I did not hear of any drag seine operations on Sand Island in 1933 and 1934. The drag seine operations on Sand Island in 1931 and 1932 were not on the area designated as Peacock Spit but were further east of them. Up in this territory (indicating). I know that there had been no drag seine operations in this territory that I have indicated on Sand Island since the dike was put in.

Redirect Examination.

I know that the two westerly dikes were not begun until 1933. [247]

W. C. BRUBAKER,

a witness for defendants, testified:

My home is in Portland where I have lived for about 25 years. For about 15 years my business or profession is aerial surveying, or photographic surveying from an airplane. I have done aerial photographing in the lower Columbia for Columbia River Packers Association, U. S. Engineers, Mr. McGowan, Mr. Welch and a few others.

Defendants' Exhibit 14 for identification was taken by me on July 10, 1928, at 11:50 A. M. at an elevation of about 3000 feet. It purports to show the sands off Clatsop Spit looking north, north off the South Jetty, shows Peacock Spit in the distance and Cape Disappointment and the North Jetty, and part of Sand Island.

(Testimony of W. C. Brubaker.)

Whereupon Exhibit 14 was received in evidence and the following is a copy.

(It is not practicable to here insert a copy of the Exhibit. The original Exhibit with two additional duplicates will be transmitted with the record on appeal for the convenience of the members of the Court). [248]

The upper edge of the picture is approximately north, the right edge is to the east and the left to the west. The black line extending out westerly from Cape Disappointment is the North Jetty.

Defendants' Exhibit 15 for identification was taken April 19th, 1930, at 11:14 A. M. Whereupon said Exhibit was received in evidence and the following is a copy.

(It is not practicable to here insert a copy of the Exhibit. The original Exhibit with two additional duplicates will be transmitted with the record on appeal for the convenience of the members of the Court). [249]

This picture shows principally the North Jetty, with the wreck of the Admiral Benson. This is what we call Peacock Spit, that is Sand Island, that is Cape Disappointment, that is Baker's Bay (indicating). The mouth of the river is over this way (indicating). That is the ocean (indicating). The lighter color represents open water.

Defendants' Exhibit 16 for identification was taken May 4, 1931, at 9:10 A. M. It purports to

(Testimony of W. C. Brubaker.)

show the North Jetty, Peacock Spit, Sand Island and also all of Baker's Bay in the distance. Whereupon Exhibit 16 was received in evidence and the following is a copy.

(It is not practicable to here insert a copy of the Exhibit. The original Exhibit with two additional duplicates will be transmitted with the record on appeal for the convenience of the members of the Court). [250]

This (indicating) is the North Jetty, Sand Island, Baker's Bay, some of the sands towards the south there, and the main channel comes through here, and this is what is known as Peacock Spit through here.

“The COURT: The ocean is over this way?

A. Yes, sir; comes right around that sand there. The South Jetty is right in here like that (indicating).”

Defendants' Exhibit 17 for identification was taken on May 4, 1931, at 9:10 A. M. about the same time as the preceding picture but at a different angle. There was probably about a minute between the two shots. Whereupon Exhibit 17 was received in evidence and the following is a copy.

(It is not practicable to here insert a copy of the Exhibit. The original Exhibit with two additional duplicates will be transmitted with

(Testimony of W. C. Brubaker.)

the record on appeal for the convenience of the members of the Court). [251]

On the right side of the picture are some sands jutting out. They are Clatsop Spit and the South Jetty on the Oregon side. Down here on the left-hand corner is the North Jetty. The black area projecting out on the left-hand side of the picture is Cape Disappointment and the heavy black area further north is Fort Columbia on the north shore of the River. It is called Port Ellis, I believe, at that point. Right here (indicating) is what is known as Sand Island and here (indicating) is what is called Peacock Spit. Of course it is cut off there by a channel. That is the cutoff channel (indicating). That is the cutoff channel south and west of Sand Island.

Defendants' Exhibit 18 for identification was taken on May 4th, 1931, at about 9:10 A. M., about the time the two preceding pictures were taken. It is a closer up view and shows a smaller area.

Thereupon Defendants' Exhibit 18 was received in evidence and the following is a copy.

(It is not practicable to here insert a copy of the Exhibit. The original Exhibit with two additional duplicates will be transmitted with the record on appeal for the convenience of the members of the Court). [252]

This (indicating) is Cape Disappointment, and the Forts and lighthouse in there, and this (indi-

(Testimony of W. C. Brubaker.)

eating) is what they call Sand Island, Baker's Bay, and this (indicating) is what is known as Peacock Spit (indicating). It is that heavy area south and west of what I designated as Sand Island. The white fringe along the southerly and south-westerly margin of what I have designated as Peacock Spit are the breakers or the waves rolling up there, where they break and cause a foam. That area was above water at the time the photograph was taken, as was also that of Sand Island. That is true of the other pictures which show those sands.

Defendants' Exhibits 19-A, 19-B, 19-C and 19-D, for identification, consisting of four photographs joined together, were taken on October 1st, 1933, at about 5:11 P. M. They are joined together in such a way as to show a continuous picture or outline.

(It is not practicable to here insert a copy of the Exhibit. The original Exhibit with two additional duplicates will be transmitted with the record on appeal for the convenience of the members of the Court).

There (indicating) is Cape Disappointment, this is Sand Island, here is Peacock Spit or the location of it, here are the same sands that are shown below the cutoff channel in the other pictures, the thin white line running out from the lower-right hand corner from Sand Island is the government dike. The clear area between what I have spoken of as

(Testimony of W. C. Brubaker.)

Sand Island and these sands to the south represent water. The whitish area to the north represents dry land and the other would be wet sand (indicating) and this area (indicating) between the white sands on what I have been referring to as Peacock Spit sands and Sand Island, represents wet sand.

And this, further north, represents open water [253] between San Island and Cape Disappointment and down here (indicating) is the cutoff channel.

Cross Examination.

I did not make the last pictures under instructions from the defendants. Most of the others I did. The instructions they gave me were just to photograph that area. Most of them were taken at low tide. Some of them we didn't take at low tide because we wouldn't get there at the exact time of low tide. I am not sure that any of them were at the extreme low tide. We were trying to catch the low tide, but sometimes we missed it a few minutes. They were all taken at about the lowest tide we could find. I don't think I took any other pictures for the defendants under their orders. They may have bought some pictures that I accidentally took around there when the water wasn't at the lowest. I have not furnished a great number of pictures to the defendants. They have bought several, but hardly any more, I guess, than what has been exhibited here. In taking these pictures I took into account the condition of the tide and examined the tide tables. I did not take the pictures at the lowest tide during

(Testimony of W. C. Brubaker.)

the month. We took into consideration the weather and things of that kind, but not always the lowest tide during the month. We would look over the tides for the entire month and sometimes for the year. Sometimes about the only instructions I had was to note the exact time when I took them, get them at low tide and note the time, the hour and date. They were taken at practically the lowest tide, but not the extreme lowest tide. On May 4th when I took one series of pictures there was a zero tide. I haven't my tide book for that year. I am not sure just what the time was. I wouldn't say that any calculation was made to get the very lowest tide possible but we wanted the lowest. [254] Sometimes we would get it, below zero. I don't believe I have any pictures taken at high tide unless there were some taken away back in 1923 or 1924. These pictures in evidence some were taken in the Spring and some in the Fall. Those taken October 1st were taken almost at sundown. I may have flown over these sands and Sand Island at some time when the tide was in and I know about what it would be down there at high tide. Except the last few years there was always white sands out there, as I recall, even at high tide. I couldn't say how big the white sand area was, but I expect there would be a thousand feet square or so there, a kind of a round spot of white sand was out there at practically high tide, until probably the last few years it has been washed down pretty well. I wouldn't say that during the

(Testimony of W. C. Brubaker.)

past few years the area west of the channel, and which is known as Peacock Spit and those sands south of Sand Island are covered by water during high tide, but I think pretty near all of that area would be covered at this time at real high water. This is true only for the last year or so. From 1930 on if I were taking a picture at high tide I would in addition to seeing Sand Island and the mainland or Cape Disappointment and the Baker's Bay see quite a bit of an island out there, I think. I made some maps there last year for a Mr. McGowan and also nearly every year and I remember there is quite a bit of an island out there. Most of them were taken in the summer time. I couldn't say what percentage of the sand shown on the pictures taken at high tide. It would depend somewhat on what year. If you refer to the year 1933, it is hard to say just how big an area would be exposed at high tide. When there is a real low tide you will see river bottom practically. It depends on whether it is a real minus. It might be minus $1\frac{1}{2}$ feet, and that takes in a lot of river bottom down there. I think more than 5% of the area you refer to would be exposed at high tide [255] at the time in 1933 when some of the pictures were taken. I have not taken any pictures in this year at high tide but I took some pictures last Monday for the U. S. Engineers when the water was 2 feet above zero. I do not have these pictures they were sent to the U. S. Engineers.

(Testimony of W. C. Brubaker.)

Redirect Examination.

All the pictures introduced in evidence were taken at the request of one or both of the defendants, except the group of four pictures fastened together which were taken in October, 1933. They were not taken at the request of either of the defendants.

Recross Examination.

The pictures taken a few days ago for the U. S. Engineers were sent to them last Tuesday.

Thereupon defendants offered, and there was received in evidence, Defendants' Exhibit 20, a lease theretofore referred to in the testimony of Mr. Clark and other witnesses, between the State of Oregon, acting by the State Land Board, as lessor, and Columbia Fishing Company, as lessee. The lease was executed November 27th, 1928, and the material provisions may be thus summarized:

(a) was for a term of five years;

(b) the State Land Board leased to Columbia Fishing Company for said term the lands surveyed by Mr. McLean in the Fall of 1928 concerning which he testified and which are described in Exhibit 9 and also embraced within the heavy red lines on the map of 1934 which is a part of Exhibit 1, some distance south of Sand Island;

(c) the rent reserved was 4 cents a pound on all food fish taken with drag seines landed on the leased property with a minimum annual payment of not less than \$4250. [256]

Thereupon there was offered and received in evidence as Defendants' Exhibit 21, a lease bearing

(Testimony of W. C. Brubaker.)

date December 22, 1932, between the State of Washington, as lessor, and Baker's Bay Fish Company, as lessee, together with the assignment of an interest therein to H. J. Barbey, in words and figures as follows: [257]

"DEFENDANTS' EXHIBIT 21

THIS LEASE, made and entered into this 22d day of December, A. D. 1932, by and between the State of Washington, party of the first part, and Baker's Bay Fish Company, Ilwaco, Washington, party of the second part.

WITNESSETH, that for and in consideration of the sum of Five Thousand and no/100 (\$5000.00) Dollars per year, to be paid to the Commissioner of Public Lands of the State of Washington yearly in advance, and in consideration of the covenants hereinafter contained, the State of Washington doth lease, demise and let unto the party of the second part that tract or parcel of tide land of the second class, situate in Pacific County, State of Washington, and described as follows, to-wit:

That portion of the tide lands of the second class, owned by the State of Washington, situate in front of, adjacent to or abutting upon the southerly side of lot 4, section 9, township 9 north, range 11 west, W.M., including Peacock Spit, lying southeasterly of the Main Channel Range, as shown upon the United States Coast and Geodetic Survey Chart No. 6151 of the Columbia River.

(Testimony of W. C. Brubaker.)

This lease is issued under the provisions of Section 126 of chapter 255 of the Session Laws of 1927, and is subject to the grant of the above described tract to the United States, under the provisions of section 150 of said chapter 255, for the period of five (5) years from the date of this instrument.

As a further consideration the following covenants are mutually agreed to:

The payment of the above mentioned annual rent to the Commissioner of Public Lands of the State of Washington yearly in advance is of the essence of this contract, and the same shall be, and is, a condition precedent to the execution and continuance of this lease or any rights thereunder, and if said annual rent shall not be paid on or before the date when due, this lease shall be null and void.

The State of Washington reserves the right to approve any assignment of the whole or any interest in and to the within leasehold.

The tide lands herein shall not be offered for sale except upon application of lessee, who shall have preference right to re-lease at highest rate bid; Provided, however, and these rights are conditioned that lessee shall keep this lease in good standing.

All improvements placed upon said land by the lessee, capable of removal without damage to the land, where the lease is yielded to the state prior to any application to purchase said land, may be removed by the lessee, or at his option may remain

(Testimony of W. C. Brubaker.)

on the land subject to purchase or hire, and this lease is granted according to the provision of an act relating to lease, etc., of state lands, approved March 16, 1897 (as amended by section 2 of an act approved March 13, 1899, and acts amendatory thereof and supplemental thereto). [258]

All piling or other improvements placed upon the above described tide lands shall attach to and become a part of the realty unless moved or sold under the provision of the said act relating to lease, etc., of state lands, approved March 16, 1897, and acts amendatory thereof and supplemental thereto within three years after termination by surrender or limitation of lease or re-lease.

No statutory right vested in lessee is waived hereby, and lessee expressly agrees to all covenants herein and binds himself or themselves for the payment of rent as hereinbefore set out.

(Seal of Com. of Public Lands)

THE STATE OF WASHINGTON

C. V. Savidge,

Commissioner of Public Lands

By: W. M. Duncan,

Assistant Commissioner of Public Lands

BAKERS BAY FISH COMPANY,

By: W. L. Thompson, Pres., Lessee

P. O. Address: c/o Barbey Packing

Company, P. O. Box 449, Astoria,

State of Oregon. [259]

Witnesses as to Lessee

A. H. Whittle

Geo. Perkin

(Testimony of W. C. Brubaker.)

ASSIGNMENT

(The Commissioner of Public Lands will not approve and enter any assignment unless lease be in good standing.)

For and in consideration of Twenty five hundred (\$2500.00) Dollars in hand paid to the within lessee and assignor, he hereby assigns, sets over and transfers one half of its right, title and interest in and to the within and foregoing lease, unto H. J. Barbey

(State of Washington Seal)

bey of Astoria, Ore., and said assignee hereby binds and obligates himself to perform all the conditions

(Bakers Bay Fish Co. seal)

and covenants of said lease.

IN WITNESS WHEREOF, We have hereunto set our hands and seals this 28th day of December, A. D. 1932.

..... (SEAL)

Assignor

BAKERS BAY FISH COMPANY

By W. L. Thompson, Pres.

(SEAL)

H. J. Barbey, Assignee (SEAL)

Witnesses:

A. H. Whittle

Geo. Perkins

State of Washington, Approved Jan. 5, 1933

A. M. Duncan,

Assistant Commissioner of Public Lands

(Testimony of W. C. Brubaker.)

ASSIGNOR'S ACKNOWLEDGMENT

State of Oregon,
County of Clatsop.—ss.

I, Geo. Perkin, do hereby certify that on this 28th day of December, 1932, personally appeared before me W. L. Thompson, President of Bakers Bay Fish Company, to me known to be the individual described in, and who executed the within instrument, and acknowledged that he signed and sealed the same as its free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal the day and year in this certificate first above written.

GEO. PERKINS,

Notary Public in and for the
State of Oregon.

(Notary Seal) Residing at Astoria, Oregon.

Notary Public for Oregon

My commission expires March 6, 1933. [260]

Thereupon there was offered and received in evidence as Defendants' Exhibit 22 a certified copy of a lease executed by the State of Washington to the Baker's Bay Fish Company, dated May 7th, 1928, for a term of five years, and carrying an annual rental of \$36,000.00 a year.

Said Exhibit 22 is identical as to description and all other terms with Exhibit 21 set out in extenso, supra, with the exception of the date, the term and

(Testimony of W. C. Brubaker.)

the annual rental reserve, which exceptions are stated above. No interest therein was assigned to H. J. Barbey. It is omitted from the record to avoid unnecessary repetition.

Thereupon there was offered and received in evidence Exhibit 23 which is a lease executed by the State of Washington to Baker's Bay Fish Company, dated June 1st, 1931, for a term of two years. As a substitute for Exhibit 22 which was terminated by mutual agreement because of economic conditions. The annual rental reserved in Exhibit 23 was \$7500.00 a year.

The said Exhibit 23 is identical with Exhibit 21, set out in extenso, supra, except as to the term and the annual rental as stated above. No interest therein was assigned to H. J. Barbey. To avoid unnecessary repetition, said Exhibit 23 is omitted from the record. [261]

G. T. McLEAN

resumed the witness stand for further cross examination.

A tracing prepared by the witness was marked, for identification, Government's Exhibit 24.

“Q. (By Mr. Hicks) Mr. McLean, examine Government's Exhibit 24 for identification and state what that is.

A. That is a tracing on which it shows an unbroken pencil line, which has been traced from the map of 1920, of the mouth of the

(Testimony of G. T. McLean.)

Columbia River, showing the high water line of Sand Island on the west and southerly shore of Sand Island as it appeared on that map, and showing the high water line on the same westerly and southerly shore of Sand Island as it appeared on the map of the mouth of the Columbia River in 1934, and the courses representing the geographical locations which appear on those two maps appear on this map and are marked in degrees and minutes to correspond to the two maps for the purposes of locating the tracing on the two maps, and also at various points along these high water lines as lines drawn at approximate right angles to the water line, and these lines are marked with the letters from "A" to "J" inclusive; and in a table at the lower left-hand corner, entitled 'Movement of Shore Line.' is given in one column, under the heading of 'Section,' the designation of these various lines; in the second column, under the heading of 'Movement', is given the measurements of the movements along each one of these lines of the shore line between the two years; and in the third column, headed 'Direction', is given the approximate direction of the movement."

That shows the recession of the southerly and westerly shore line of Sand Island from the year 1920 to the year 1935. [262] It is not any more accurate than the figures I gave before but because this map or tracing shows the comparative con-

(Testimony of G. T. McLean.)

dition between 1920 and 1935 of all points along the westerly and southerly side of Sand Island it is more complete. The measurements given in my previous testimony covered, however, all of the years between 1920 and 1934. This last tracing shows only the comparison between the years 1920 and 1934. My recollection is that the maximum recession along that northerly part of the island was 5000.

“Q. Now, what is the amount of recession along that line shown by the document which you hold in your right hand?

A. That is a misstatement, in that the measurement from the basic point, the largest and longest measurement from the basic point, to the point of the island at which it was farthest away from that point was 5,000. That doesn't mean that the recession was five thousand. I wouldn't remember what the actual recession was, because there is an accumulation, you see, of all of the years from 1920 to 1934.”

(As it is impracticable to include the said map or tracing in this statement, the original and two additional copies will be transmitted with the record on appeal, for use of the members of the Court).

Thereupon the original complaint in this suit was offered in evidence by plaintiff as Exhibit 25 and, omitting the formal parts, is in words and figures

(Testimony of G. T. McLean.)

as follows: (The map attached to said complaint as Exhibit A is identical with the 1934 map included in Exhibit 1 in this case and is therefore omitted to avoid repetition): [263]

GOVERNMENT'S EXHIBIT 25

COMES NOW the United States of America, by Carl C. Donough, United States Attorney for the District of Oregon, under the direction of the Attorney General of the United States, and for its cause of suit against the above-named defendants, alleges:

I.

That the boundaries between the States of Oregon and Washington are fixed as of the middle of the north ship channel of the Columbia River, by Act of Congress of February 14, 1859, 11 St. L. 383, Ch. 33, admitting Oregon into the Union, and said north ship channel passes between Cape Disappointment on the west and Sand Island on the east, and runs in a northerly direction and thence around Sand Island on the north in an easterly direction, which fact was well known to the defendants.

II.

That on the 21st day of October, 1864, the Legislative Assembly of the State of Oregon passed an act entitled:

“AN ACT to grant to the United States all right and interest of the State of Oregon to certain tide lands herein mentioned.

(Testimony of G. T. McLean.)

“Section I. There is hereby granted to the United States, all right and interest of the State of Oregon, in and to the land in front of Fort Stevens, and Point Adams, situate in this state, and subject to overflow, between high and low tide, and also to Sand Island, situate at the mouth of the Columbia River in this state; the said island being subject to overflow between high and low tide.”

That ever since the passage of said Act, plaintiff has been in the possession of said Sand Island and is now the exclusive owner thereof and entitled to the immediate and exclusive possession thereof.
[264]

III.

That during all the times herein mentioned said Sand Island was located within the estuary of the Columbia River, United States of America, within Clatsop County, State of Oregon, and within the jurisdiction of this court.

IV.

That the said tract of land called “Sand Island” is located and described upon a certain official map and chart prepared by the War Department of the United States for the year 1933, which said official map and chart of said Sand Island showing the location thereof in the said Columbia River and within the State of Oregon, and also showing the location of the said Main North Channel of the

(Testimony of G. T. McLean.)

Columbia River is hereto attached marked "Exhibit A" and by reference made a part of this complaint, which said "Exhibit A" shows the location of said Sand Island to be east and south of the said North Ship Channel of the Columbia River.

V.

That the waters of the Columbia River adjacent to Sand Island are shallow and are frequented by salmon, and the beach or spit on the west and southwest end of Sand Island is peculiarly adapted to the drawing of seines and floating fishing gear, and said waters are immensely valuable for the purpose of seining for salmon.

VI.

That during all the times herein mentioned the defendant, Columbia River Packers Association was and now is a corporation, organized under the laws of the State of Oregon and engaged in the business of fishing for salmon, and owning and operating canneries, and the defendant Baker's Bay Fish Company is a subsidiary corporation of said defendant [265] Columbia River Packers Association, and all of the capital stock thereof is owned and/or controlled by said defendant Columbia River Packers Association, so that the said Baker's Bay Fish Company is the corporate agent of said Columbia River Packers Association.

VII.

That during all the times herein mentioned the

(Testimony of G. T. McLean.)

defendant, Baker's Bay Fish Company was and now is a corporation organized under the laws of the State of Washington, engaged in the business of fishing in the waters of the Columbia River hereinafter described.

VIII.

That on or about the 1st day of May, 1930, the defendants, H. J. Barbey and the Columbia River Packers Association, a corporation, leased from plaintiff for seining purposes only, for a period of five years, the land on the south side of Sand Island which is described as Sites Nos. 1, 2, 3, 4 and 5 in said lease, and which is well known to all of the defendants herein, and which is more particularly described and mapped in that certain cause of *Strandholm v. Barbey*, 144 Or. 705, 26 P. (2d) at page 48, to which reference is hereby made, and the same is hereby incorporated herein by this reference the same as if said descriptions were fully impleaded herein.

IX.

That defendants, after having occupied said Sand Island under the terms of said lease for two seasons, for the years 1930 and 1931, thereupon abandoned said lease and secured a cancellation thereof, but prior thereto and for the fraudulent purpose of securing the right to fish the aforementioned waters south and west of Sand Island within the [266] State of Oregon with drag seines, and to

(Testimony of G. T. McLean.)

drag said seines upon the banks of said Sand Island, without paying plaintiff for the privilege therefor, and well knowing that the said waters and the land upon which said seines would be drawn was in the State of Oregon and not within the State of Washington, fraudulently entered into a pretended lease with the State of Washington, through its said Commissioner of Public Lands, for certain lands which were described as "Peacock Spit", but which were in fact lands which lie between low water mark and high water mark on a spit wholly within the boundaries of the State of Oregon, and a part of said Sand Island.

X.

That said defendants have fished said premises for the years 1932, 1933 and 1934 and used plaintiff's property as aforesaid, without paying plaintiff any rental therefor and will continue to fish said premises to the irreparable injury of plaintiff, unless restrained by order of this Court.

XI.

That the defendants, H. J. Barbey and Columbia River Packers Association and Baker's Bay Fish Company operate four fish seines, each being over 1250 feet in length over said premises belonging to plaintiff, and take from plaintiff's said premises immense quantities of salmon, and drag said seines upon the beaches, i. e., the land between high and low tides, of said Sand Island, for the purpose of

(Testimony of G. T. McLean.)

taking fish; that in connection with said seining operations of said defendants, the said defendants keep on said Sand Island twenty-six or more horses and stable [267] said horses in buildings constructed by defendants on the main land of said Island.

XII.

That defendants have no right, title or interest in and to said premises and should be restrained by order of this Court from fishing said premises and occupying said premises.

WHEREFORE, Plaintiff prays a decree of Court as follows:

1. For an order of the Court directing the defendant, Columbia River Packers Association, a corporation, Baker's Bay Fish Company, a corporation, and H. J. Barbey to appear at a time fixed by this Court, and show cause why the said defendants should not be enjoined and restrained from trespassing upon the said premises set forth in the complaint herein and from seining said premises and the landing of fish thereon and using said premises for horses and men and carrying on said fishing and seining operations.

2. That upon a hearing of this cause the Court decree that the defendants herein, and each of them, have no right, title or interest in and to those certain premises lying in the Columbia River south and west of Sand Island, or south and east of the Main North Ship Channel of the Columbia River

(Testimony of G. T. McLean.)

as shown by the Government map of the year 1933, and that the Court enter a decree declaring that the said premises are wholly within the State of Oregon, and the property of the plaintiff herein and that the plaintiff is entitled to the immediate and exclusive possession thereof, and that the Court render a further decree restraining and enjoining said defendants, and each of them, from using said premises in the manner aforesaid. [268]

3. That the plaintiff recover of and from the defendants its costs and disbursements herein. [269]

It was then stipulated as follows:

That the photograph (Exhibit 14) was taken on July 10, 1928, at 11:50 A. M. and that low water on that day, in that area, would be at 12:05 P. M.;

That the photograph (Exhibit 15) was taken on April 19, 1930, at 11:14 A. M. and that low water on that day, in that area, would be at 11:25 A. M.; taken on May 4, 1931, at about 9:10 A. M. and on that day, in that area, low water would be at 9:28 A. M.;

That the photographs, four in number, jointed together to make up Exhibits 19-A, 19-B, 19-C and 19-D were taken on October 1, 1933, at about 5:11 P. M. and that low water on that day, in that area, was at 4:48 P. M.

(Testimony of G. T. McLean.)

Thereupon counsel for the government offered in evidence as Government's Exhibits 26, 27 and 28 the original complaint, answer and amended answer in case No. L 11901 brought in the District Court of the United States for the District of Oregon by the United States of America, as plaintiff and against Columbia River Packers Association and others, as defendants.

To which offer defendants objected as incompetent, irrelevant, immaterial, not proper rebuttal and have no tendency to prove any issue in this case.

Thereupon the court reserved ruling upon the offer, stating:

“The COURT: Well, I haven't time to examine the pleadings offered. I will reserve ruling on the admissibility of those, and then when I finally dispose of the case I will rule on it then.”

No ruling was made with respect to the offer before the disposition of the case, or thereafter, hence they are omitted from this statement. [270]

MR. W. C. BRUBAKER

was recalled sa a witness for the government and testified:

Direct Examination.

Government Exhibit 29, for identification, was taken by me at 1:15 P. M. on June 10, 1935, and

(Testimony of W. C. Brubaker.)

shows the area about Sand Island, Peacock Spit, North Jetty, Cape Disappointment and the district down there.

Government Exhibit 30, for identification, was taken at 1:14 P. M. on the same day. It is looking out over Ilwaco to the south showing Sand Island, the entrance to the Columbia, Cape Disappointment and all that area.

Government Exhibit 31, for identification, was taken by me at 1:16 P. M. of the same day. This shows Baker's Bay from over Fort Columbia, Sand Island, Peacock Spit and North Jetty and I guess the town of Ilwaco. I don't know whether this is Chinook or McGowan, on there. The pictures were taken by myself for the U. S. Engineers and accurately show the situation at that time. They were not retouched in any way. The state of the water at the time these pictures were taken was about 2.2 feet above low tide.

Cross Examination.

I took some other pictures for the government about the same time but they were around the south jetty and north jetty and didn't show up close. I didn't take any at a higher tide.

Exhibit 29 was taken on a tide of 2.2 ft. The mark or projection here (indicating) is the dike and here is the cutoff channel. It shows slight and I don't suppose it is very deep. Here is a little breaker in it (indicating), over to the southwest

(Testimony of W. C. Brubaker.)

of Sand Island is a body of clear water with a channel leading into it. That is about the location of the old channel that used to run up the southwest of the island. [271]

Exhibit 30 covers a much larger area and is therefore on a smaller scale. On the lower part of the picture is some structures leading out from the mainland which is the life saving station on Cape Disappointment. Here (indicating) are the sands that I referred to as Peacock Spit in connection with the other pictures introduced. They are all of those sands running down from Cape Disappointment.

On Exhibit 31 the sands are still there and most of them above the 2.2 ft. level of water. The light or white is sand and breakers. They are out towards the edge.

Exhibits 29, 30 and 31 were received in evidence.

(It is not practicable to here insert copies of the Exhibits. The original Exhibits with two additional duplicates of each will be transmitted with the record on appeal for the convenience of the members of the Court). [272]

After the Court handed down its opinion, the plaintiff duly served and submitted to the Court the following

Proposed Amended Findings and Conclusions:

(Heading omitted)

[273]

The above-entitled cause came on regularly for trial in the above-entitled Court, Honorable Charles C. Cavanah, Judge of said Court, presiding, on the 11th day of June, 1935, the plaintiff, United States of America, appearing and being represented by Edwin D. Hicks, Assistant United States Attorney for the District of Oregon, and defendants, Columbia River Packers' Association, a corporation; Baker's Bay Fish Company, a corporation, and H. J. Barbey, appearing and being represented by A. E. Clark and Jay Bowerman, whereupon evidence, both oral and documentary, on behalf of the several parties was offered and received, the Court, having duly considered the evidence and arguments of counsel and being fully advised in the premises, now finds the following:

FINDING OF FACT No. 1.

That on the 21st day of October, 1864, the Legislative Assembly of the State of Oregon passed an Act entitled:

“An Act to grant to the United States all right and interest of the State of Oregon to certain tide lands herein mentioned:”

That Section 1 of said Act provided as follows:

“Section 1. There is hereby granted to the United States, all right and interest of the State of Oregon, in and to the land in front of Fort Stevens, and Point Adams, situate in this state,

and subject to overflow, between high and low tides, and also to Sand Island, situate at the mouth of the Columbia River in this state; the said island being subject to overflow between high and low tide.”

That the said Sand Island has been for many years last past, and now is, located in the estuary of the Columbia River, near the mouth of said River, within the United States of America and within Clatsop County, State of Oregon, and within the jurisdiction of this Court. For a more complete and detailed description of said Island, reference is made to the maps and charts hereto attached and which form a part hereof and which show the approximate locations, with the sands abutting from the southerly shores thereof. [274]

For many years last past, save for the occupation of said premises under leases and licenses executed by plaintiff from time to time and save for the encroachment of the defendants as to the years 1933 and 1934 as hereinafter recited, plaintiff has held exclusive possession of Sand Island as holder of the unqualified fee and has so possessed the same as a military reservation of the United States, and said plaintiff is now the exclusive holder thereof and entitled to the exclusive possession thereof.

FINDING OF FACT No. 2.

The North Ship Channel of the Columbia River is an existent channel which takes a course westerly and northerly of Sand Island through Baker Bay

and proceeds thence southerly into the main or south channel of the Columbia River between the eastern shore of Cape Disappointment within the State of Washington and the westerly shore of Sand Island, and the said channel as so constituted marks the boundary line between the States of Oregon and Washington.

FINDING OF FACT No. 3.

That there is abutting from Sand Island a body of sands which forms the southerly and extreme southwesterly shore line of said Island and the same is subject to overflow between high and low tides. (See Exhibit "A", the map hereto attached). These sands have formed as accretions and additions to Sand Island through the normal processes of the waves, sands, tides and currents of the Columbia River, which said waves, sands, tides and currents have caused articles of sand and a certain sand bar and/or bars, situate during years previous to the south and west of Sand Island, to be broken up and shifted, to become attached to said Sand Island by a slow and imperceptible process; the said sands so formed constitute an accretion and an addition to Sand Island and form a part thereof.

The southerly and extreme southwesterly shore line of said Sand Island abuts upon and faces, without obstruction, the main body of the Columbia River and embraces the fishing sites and locations [275] hereinafter more particularly referred to as Sites No. 1, 2, 3, 4 and 5, respectively. (See plaintiff's Exhibit "B" hereto attached).

FINDING OF FACT No. 4.

That the waters of the Columbia River adjacent to Sand Island are frequented by salmon, and the sands abutting from the main land of said Sand Island along the southerly and extreme southwesterly shore are peculiarly adapted for use in the drawing of seines and floating of fishing gear, and the said sands have had at all times herein mentioned, and do now have, great value as sites and locations for the carrying on of fishing operations.

FINDING OF FACT No. 5.

That the Columbia River Packers Association, defendant herein, was at all times mentioned herein with respect to the operations of said company, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and during said times has been engaged, among other things, in the business of fishing for salmon and operating salmon canneries.

That the Baker's Bay Fish Company, defendant herein, was at all times mentioned herein with respect to the operations of said company, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Washington and during said times has been engaged, among other things, in the business of fishing for salmon and operating salmon canneries.

FINDING OF FACT No. 6.

That on the 27th day of March, 1930, the defendants, H. J. Barbey and the Columbia River Packers

Association, defendants herein, leased from plaintiff, for seining and fishing purposes only, for a period of five years, certain fishing sites and locations styled as Sites Numbered 1, 2, 3, 4 and 5, which said sites embrace a continuous area along the southerly and extreme southwesterly shore of [276] Sand Island, more particularly described, as to their approximate location, upon the map hereto attached and made a part hereof, marked Exhibit "B"; that said defendants, and each of them, including the Baker's Bay Fish Company, after having occupied said Sand Island under the terms of the lease last above referred to for two successive seasons, to-wit: for the years 1930 and 1931, thereupon secured a cancellation thereof as of the 10th day of May, 1932; that thereafter, and during the fishing seasons of 1933 and 1934, the said defendants continued to use the said properties and sites for the carrying on of fishing operations, without authority, or lease, or license of and from the plaintiff and in defiance of plaintiff's right to absolute and exclusive possession of the said premises.

FINDING OF FACT No. 7.

That the defendants have threatened, and are now threatening, to enter upon the fishing sites and locations upon Sand Island embracing the sands situate along the southerly and extreme southwesterly shore of said Island, heretofore described, and to conduct fishing operations thereon, and unless said defendants, and each of them, are restrained by this Court from entering upon and repeating

the occupancy of said premises without right or authority as aforesaid, the said defendants will occupy the said fishing sites and locations for the fishing season of 1935 and succeeding years, to the irreparable injury and damage of plaintiff.

FINDING OF FACT No. 8.

That the defendants have no right, title and/or interest in and to Sand Island and the sands abutting therefrom and forming, a part thereof along the southerly and extreme southwesterly shore of said Island, and have never enjoyed rights or interests therein, save such as were obtained by said defendants by and under leases regularly entered into between the said defendants, or either or any of them, and the plaintiff, the United States of America; that said defendants should be restrained from fishing the said premises and occupying the same.
[277]

FINDING OF FACT No. 9.

That plaintiff has no plain, speedy or adequate remedy at law.

And the Court, being fully advised in the premises, does find the following:

CONCLUSION OF LAW No. 1.

That the State of Oregon granted to plaintiff, United States of America, on the 21st day of October, 1864, an unqualified fee in and to Sand Island, which said Island was described in the Legislative Act granting said premises as follows:

“Section 1. There is hereby granted to the United States all right and interest of the State of Oregon, in and to the land in front of Fort Stevens, and Point Adams, situate in this state, and subject to overflow between high and low tides, and also to Sand Island, situate at the mouth of the Columbia River in this state; the said island being subject to overflow between high and low tide.”

That the said Sand Island is and for many years last past has been located within Clatsop County, State of Oregon, and within the jurisdiction of this Court; that for many years last past, save for the occupation of said premises under licenses and leases executed by plaintiff from time to time and save for the encroachment of defendants as of the years 1933 and 1934, as hereinafter recited, plaintiff has been entitled to the exclusive possession of Sand Island as holder of the unqualified fee and has so possessed the same as a military reservation of the United States, and said plaintiff is now the exclusive holder thereof and entitled to the exclusive possession thereof.

CONCLUSION OF LAW No. 2.

That the North Ship Channel of the Columbia River is an existent channel, which takes a course westerly and northerly of Sand Island through Baker Bay and proceeds thence southerly into the main or south channel of the Columbia River between the eastern shore of Cape Disappointment

within the State of Washington and the westerly shore of Sand Island; the said channel as so constituted marks the [278] boundary line between the States of Oregon and Washington.

CONCLUSION OF LAW No. 3.

That the Columbia River Packers Association, defendant herein, was at all times mentioned herein with respect to the operations of said company, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon and during said times has been engaged, among other things, in the business of fishing for salmon and operating salmon canneries.

That the Baker's Bay Fish Company, defendant herein, was at all times mentioned herein with respect to the operations of said company, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and during said times has been engaged, among other things, in the business of fishing for salmon and operating salmon canneries.

CONCLUSION OF LAW No. 4.

That the sands abutting upon and from the mainland of Sand Island, and which form the southerly and extreme southwesterly shore line thereof, have formed as accretions and additions to Sand Island and are a part and parcel thereof, and the property of the United States of America. The southerly and extreme southwesterly shore line of Sand Island abuts upon and faces, without obstruction, the main

body of the Columbia River and embraces the fishing sites and locations described as Sites 1, 2, 3, 4 and 5, respectively, situate to comprise a continuous area along the southerly and extreme southwesterly shore of said Island and which are more particularly described, as to approximate location, by reference to the maps, styled Exhibits "A" and "B", attached hereto and made a part hereof.

CONCLUSION OF LAW No. 5.

That that certain lease or license granted by plaintiff to the Columbia River Packers Association, defendant herein, and H. J. Barbey, defendant herein, under date of March 27, 1930, and which by its provisions was to extend for a period of five years from the date of its execution, was legally valid and binding and permitted occupancy of the fishing sites and locations hereinabove defined by [279] said defendants up to and until the 10th day of May, 1932, when the same was legally cancelled; that thereafter and during the fishing seasons of the years 1933 and 1934, respectively, the occupancy of Sand Island and the fishing sites aforesaid, appurtenant thereto, by said defendants was without right and constituted a trespass upon said properties and a violation and encroachment upon the right of the United States to have and hold absolute and exclusive possession of said Sand Island.

CONCLUSION OF LAW No. 6.

That said defendants, and each of them, are without right, title or interest in and to Sand Island

or any part thereof, including the sands which have formed as accretions to said Island as aforesaid, and which embrace in part the fishing sites numbered 1, 2, 3, 4 and 5, respectively, heretofore more particularly described.

CONCLUSION OF LAW No. 7.

That the defendants have threatened and are now threatening to enter upon the fishing sites and locations upon Sand Island heretofore described and to conduct fishing operations thereon, and unless defendants are permanently restrained and enjoined from entering upon and conducting fishing operations upon said fishing sites and locations, the plaintiff herein will suffer irreparable injury and damage.

CONCLUSION OF LAW No. 8.

That a decree should be entered herein enjoining the said Columbia River Packers Association, Baker's Bay Fish Company, and H. J. Barbey, permanently inhibiting and restraining said defendants, and each of them, and all their officers and agents and employees, from entering upon or occupying Sand Island and any part thereof, including the sands abutting therefrom and which form a part thereof, as aforesaid, and which embrace the fishing sites numbered 1, 2, 3, 4 and 5, respectively, and which are hereinabove more particularly described. [280]

CONCLUSION OF LAW No. 9.

That plaintiff has no plain, speedy or adequate remedy at law.

CONCLUSION OF LAW No. 10.

That plaintiff is entitled to recover of and from the defendants its costs and disbursements incurred herein.

To all of which the defendants, and each of them, do hereby except and exception allowed.

Dated at Portland, Oregon, this day
of, 1935.

.....
District Judge. [281]

(EXHIBIT "A" mentioned in and attached to said proposed findings and conclusions is identical with Exhibit 5 received in evidence and hence is here omitted. No Exhibit "B" was attached).

Thereupon defendants duly served and submitted to the Court the following objections and exceptions to said proposed findings and conclusions, as amended. [282]

[Title of Court and Cause.]

Objections and Exceptions of Defendants to
Proposed Findings of Fact and Con-
clusions of Law as Amended.

Come now the defendants, and object and except to the proposed Findings of Fact and Conclusions of Law as amended which were prepared and served by counsel for the plaintiff upon the defendants, as follows:

I.

To Finding of Fact No. 1 and particularly the following part thereof:

“For a more complete and detailed description of said Island, reference is made to the maps and charts hereto attached and which form a part hereof and which show the approximate locations, with the sands abutting from the southerly shores thereof.

For many years last past, save for the occupation of said premises under leases and licenses executed by plaintiff from time to time and save for the encroachment of the defendants as to the years 1933 and 1934 as herein-after recited, plaintiff has held exclusive possession of Sand Island as holder of the unqualified fee and has so possessed the same as a military reservation of the United States, and said plaintiff is now the exclusive holder thereof and entitled to the exclusive possession thereof.”,

for the following reasons:

(a) That the said Finding undertakes to describe Sand Island as claimed by the plaintiff, by referring to maps and charts attached to the proposed Finding. That there are no charts attached thereto. That there is what purports to be a [283] map attached thereto, marked Exhibit A, which is an inaccurate, incomplete result of some partial and unfinished surveys as disclosed by the evidence.

(b) That said proposed Finding as to the de-

scription of Sand Island is so vague, indefinite and uncertain as to be incapable of understanding, determination or application to the facts in evidence or to the area in controversy.

(c) That said Exhibit A attached to the proposed Findings of Fact and Conclusions of Law as amended does not purport to exhibit conditions existing at the time this suit was brought or at any time prior thereto but insofar as it discloses conditions in the vicinity of Sand Island it relates to the year 1935 after the sands south and west of Sand Island and which constitute the premises in controversy, had through accretions built up and enlarged to a point of juncture with Sand Island.

(d) That said map is not complete, is the result of partial surveys and was prepared for the purpose of making it appear that the sands constituting the area in controversy had grown out from Sand Island rather than growing toward Sand Island.

(e) That the said map, Exhibit A, has no tendency to prove any issue in this case and no tendency to prove that the sands in controversy are accretions to Sand Island.

(f) Object and except to attaching to the Proposed Findings of Fact and Conclusions of Law, as amended, the said map, Exhibit A, or any other maps or charts which are referred to in said proposed Findings and Conclusions but not in anywise identified or attached, as hereinbefore stated, upon the ground that it would be unfair and improper to select a particular map or chart and attach the

same to [284] the proposed Findings of Fact and Conclusions of Law, as amended, there being many maps and charts in evidence showing the conditions from time to time and from year to year.

(g) That the proposed finding that plaintiff has been in the exclusive possession of Sand Island

“save for the encroachment of the defendants as to the years 1933 and 1934”

is ambiguous, indefinite and uncertain, as what constitutes Sand Island in the meaning of this finding is undetermined except by vague reference to maps and charts which are not attached to the proposed findings and, furthermore, the recital

“save for the encroachment of the defendants as to the years 1933 and 1934”

is wholly unsupported by the evidence and is directly contrary to the undisputed evidence.

II.

Object and except to the Proposed Finding of Fact No. 2 for the following reasons:

(a) That the description of the course of the North Ship Channel as it proceeds through and westerly from Baker's Bay is vague, indefinite and incapable of location, and is contrary to the evidence.

(b) It undertakes to find and fix the boundary line between the States of Oregon and Washington without the presence of either State in this case.

III.

Object and except to proposed Finding of Fact No. 3 for the following reasons:

(a) That the same is vague, indefinite and incapable of application to the evidence or to the area in controversy.

(b) Assuming that the sands referred to in said proposed [285] finding are the bodies of sand disclosed by the testimony, including the maps in evidence in this case, that the same is unsupported by and contrary to the evidence and contrary to law.

(c) That it undertakes to attach to and make a part of Sand Island the whole area southerly to the main or South Ship Channel of the Columbia River, which is far distant from Sand Island, contrary to the evidence and contrary to law.

(d) That the premises in controversy in this case are not at or near sites Nos. 1, 2, 3, 4 and 5, or either thereof.

(e) That no Exhibit B is attached to the Proposed Findings of Fact and Conclusions of Law, as amended, and there is no means of determining what is meant by Exhibit B, whether it is a map, plat, chart or other document, and therefore such reference is meaningless and should be deleted.

IV.

Object and except to proposed Finding of Fact No. 4 upon the ground that the same is wholly unsupported by and is contrary to the evidence.

V.

Object and except to proposed Finding of Fact No. 6, as amended, as follows:

(a) That the premises in controversy are not at, near or connected with sites Nos. 1, 2, 3, 4 and 5, or either thereof.

(b) That in said Finding the location of certain premises purport to be shown by a map said to be marked Exhibit B. That no map, chart or other document marked Exhibit B is attached to said Proposed Findings of Fact and [286] Conclusions of Law, as amended, or made a part thereof.

(c) That the sites numbered 1, 2, 3, 4, and 5 on Sand Island covered by a lease of March 27, 1930, extended only to low water mark on Sand Island and did not extend, as disclosed by the undisputed evidence in this case, to any areas below low water mark as aforesaid and did not extend to any of the premises in controversy in this suit, which premises do not now and never did constitute any part of Sand Island or any part of sites 1, 2, 3, 4 and 5.

(d) That the recital that defendants during the fishing seasons of 1933 and 1934 continued to use sites 1, 2, 3, 4 and 5 for the carrying on of fishing operations is unsupported by and contrary to the evidence, the undisputed evidence being that neither of the defendants used said sites or either thereof, for the purpose of carrying on any fishing operations after August 25, 1931.

VI.

Object and except to proposed Finding of Fact No. 7 for the reasons that the same is unsupported

by and is contrary to the evidence, that by the use of an alleged map of 1932 plaintiff is endeavoring to have this court take jurisdiction over and adjudicate rights concerning the lands and areas on the Washington side of the only charted channel into Baker's Bay as disclosed by later maps, and it is undertaking to deprive defendants as lessees of the State of Washington of what rights they may have under leases of lands in front of and lying on the Washington side of the North Ship Channel as it existed when this suit was brought and as it existed since this case was tried.

VII.

Object and except to proposed Finding of Fact No. [287] 8, as amended, for the reasons:

(a) That the recital that the defendants have no right, title and/or interest in and to Sand Island is outside the issues and meaningless for the reasons that the defendants have at no time claimed, either in the pleadings in this suit or otherwise, that they had any right, title or interest in or to said Island or any part thereof, and at all times expressly disclaimed any interest therein, and what is meant by the term "Sand Island" in this recital is left uncertain and undetermined.

(b) The recital that the defendants have no right, title and/or interest in the sands abutting upon said Sand Island and forming a part thereof along the southerly and southwesterly shore is also outside the issues and meaningless, as the defendants have not, either in the pleadings or otherwise,

claimed any right, title or interest in Sand Island or any sands which are a part thereof but on the contrary have expressly disclaimed any such interest, and what sands are referred to as abutting on Sand Island are left undescribed and undetermined.

(c) If by Sand Island and the sands abutting therefrom, it is intended to include the premises in controversy in this suit, the recital or finding is unsupported by the evidence and is contrary to the undisputed evidence which shows that there were no accretions to Sand Island on the southerly and westerly shore thereof during the past ten or fifteen years but that said shore line had eroded or receded and that the sand formations to the south and west had formed a juncture with Sand Island at certain points through accretion to said sands and not through accretions to Sand Island. [288]

(d) That, if said finding is intended to describe and embrace the premises in controversy in this suit, it is undertaking to find and adjudicate upon rights concerning lands and areas on the Washington side of the North Ship Channel into Baker's Bay and to determine the location of the North Ship Channel and the boundary line between the two States and is undertaking to deprive defendants, as lessees of the State of Washington, of such rights as they may have under leases from said State.

(e) It finds by inference that the defendants have been fishing on Sand Island and that they should be restrained from so doing, when by the

by and is contrary to the evidence, that by the use of an alleged map of 1932 plaintiff is endeavoring to have this court take jurisdiction over and adjudicate rights concerning the lands and areas on the Washington side of the only charted channel into Baker's Bay as disclosed by later maps, and it is undertaking to deprive defendants as lessees of the State of Washington of what rights they may have under leases of lands in front of and lying on the Washington side of the North Ship Channel as it existed when this suit was brought and as it existed since this case was tried.

VII.

Object and except to proposed Finding of Fact No. [287] 8. as amended, for the reasons:

(a) That the recital that the defendants have no right, title and/or interest in and to Sand Island is outside the issues and meaningless for the reasons that the defendants have at no time claimed, either in the pleadings in this suit or otherwise, that they had any right, title or interest in or to said Island or any part thereof, and at all times expressly disclaimed any interest therein, and what is meant by the term "Sand Island" in this recital is left uncertain and undetermined.

(b) The recital that the defendants have no right, title and/or interest in the sands abutting upon said Sand Island and forming a part thereof along the southerly and southwesterly shore is also outside the issues and meaningless, as the defendants have not, either in the pleadings or otherwise,

claimed any right, title or interest in Sand Island or any sands which are a part thereof but on the contrary have expressly disclaimed any such interest, and what sands are referred to as abutting on Sand Island are left undescribed and undetermined.

(c) If by Sand Island and the sands abutting therefrom, it is intended to include the premises in controversy in this suit, the recital or finding is unsupported by the evidence and is contrary to the undisputed evidence which shows that there were no accretions to Sand Island on the southerly and westerly shore thereof during the past ten or fifteen years but that said shore line had eroded or receded and that the sand formations to the south and west had formed a juncture with Sand Island at certain points through accretion to said sands and not through accretions to Sand Island. [288]

(d) That, if said finding is intended to describe and embrace the premises in controversy in this suit, it is undertaking to find and adjudicate upon rights concerning lands and areas on the Washington side of the North Ship Channel into Baker's Bay and to determine the location of the North Ship Channel and the boundary line between the two States and is undertaking to deprive defendants, as lessees of the State of Washington, of such rights as they may have under leases from said State.

(e) It finds by inference that the defendants have been fishing on Sand Island and that they should be restrained from so doing, when by the

undisputed testimony the defendants have not fished on Sand Island, or any part of Sand Island, and have not attempted to do so, since August 25, 1931.

VIII.

Object and except to all and singular the proposed Conclusions of Law, for the reasons:

(a) That they are not conclusions of law, but mere repetitions, sometimes in identical form and sometimes in different form, of the proposed Findings of Fact, as amended.

(b) That they are unsupported by and contrary to the evidence and to law.

(c) That they are unsupported by the Proposed Findings of Fact, as amended.

(d) For the further reason that the only decree which may be properly entered in this suit is a decree dismissing the bill of complaint and the suit.

These objections and exceptions are filed without in anywise waiving the objections and exceptions heretofore filed to the Findings of Fact and Conclusions of Law served upon counsel for defendants some days prior to the service [289] upon them of the Proposed Findings of Fact and Conclusions of Law, as amended.

JAY BOWERMAN

A. E. CLARK

Attorneys for Defendants. [290]

Thereupon and after consideration of the foregoing, the Court made, filed and caused to be entered the findings, conclusions and decree which were entered in this suit.

CLARK & CLARK,
JAY BOWERMAN,
Attorneys for Defendants-Appellants.

District of Oregon,
State of Oregon,
County of Multnomah.—ss.

Due and timely service of the foregoing Statement of the Evidence and Trial Record is hereby admitted at Portland, Oregon, this 31st day of October, 1935, by receiving a copy thereof, duly certified to as such by A. E. Clark of Attorneys for Defendants-Appellants.

CARL C. DONAUGH,
Attorneys for Plaintiff-Respondent.

State of Oregon,
County of Multnomah,
District of Oregon—ss.

Due and timely service of the foregoing Statement of the Evidence and Trial Record, together with receipt of a copy thereof, duly certified as such by A. E. Clark, one of the attorneys for defendants-appellants, is hereby admitted at Portland, Oregon, this 31st day of October, 1935, and any other or further notice of the filing and lodging of said statement and record with the clerk of the above named court is hereby waived and consent given that said

statement may be changed, modified and approved in its present form or as changed and modified without further notice to the State of Oregon.

I. H. VAN WINKLE,
Attorney General of the State of Oregon.

RALPH E. MOODY,
Assistant Attorney General,
Attorney for the State of Oregon.

Due and timely service of the attached Statement of evidence lodged by defendant with the clerk of the above court on October 31st, 1935.

G. W. HAMILTON,
Attorney General of the State of Washington.

R. G. SHARPE,
Assistant Attorney General of the State
of Washington,
Attorneys for the State of Washington. [291]

IT IS AGREED that the foregoing statement of the evidence and trial record is proper and consent is hereby given to the approval, allowance and settling thereof by the Court forthwith.

Dated this 16th day of November, 1935.

UNITED STATES DISTRICT
ATTORNEY,

EDWIN D. HICKS,

Solicitor for Plaintiff.

ALFRED E. CLARK,

M. H. CLARK,

JAY BOWERMAN,

Solicitors for Defendants. [292]

This is to certify that the foregoing statement of evidence and trial record is hereby allowed and approved and, together with the exhibits hereinafter referred to, declared to contain a statement of all the evidence and of the trial record in said cause bearing upon the questions involved on appeal in said cause, and that portions of said evidence which appear in the exact words of the witnesses are so reproduced, at the request of one or the other of the parties to this cause, and by direction of the Court, in order to properly present the effect thereof. The Court has by separate order identified as having been received in evidence and made a part of the record on appeal exhibits marked "Government's Exhibits 1, 2, 3, 5, 6, 24, 25, 29, 30 and 31" and "Defendants' Exhibits 8, 9, 14, 15, 16, 17, 18, 19-A, 19-B, 19-C, 19-D, 20, 21, 22 and 23" and said statement of the evidence and trial record is hereby ordered filed as the statement of the evidence and trial record to be included in the record on appeal in the above-entitled cause, as provided in Equity Rule No. 75.

Dated this 18th day of November, 1935.

CHARLES C. CAVANAH,

Judge of the United States District Court for the
District of Oregon, presiding in the above-entitled cause.

[Endorsed]: Filed November 19, 1935. [293]

AND AFTERWARDS, to-wit, on the 22nd day of November, 1935, there was duly filed in said Court, a SUPPLEMENTAL PRAECIPE FOR TRANSCRIPT, in words and figures as follows, to-wit: [294]

[Title of Court and Cause.]

SUPPLEMENTAL PRAECIPE FOR
TRANSCRIPT.

To the Clerk of the Above-Entitled Court:

You will please prepare and certify as a part of the record on appeal in this cause, for transmission to the United States Circuit Court of Appeals for the Ninth Circuit, in addition to the papers, files and documents specified in the Praecipe for Transcript heretofore filed, the following additional papers which have been filed since said former Praecipe was filed:

(1) The Opinion of the court made and entered prior to the entry of the Findings of Fact, Conclusions of Law and Decree.

(2) Stipulation between the defendants and the State of Oregon relating to Plaintiff's exhibits 1, 5, 6, 24, 29, 30 and 31 and Defendants' exhibits 14, 15, 16, 17, 18, 19-A, 19-B, 19-C and 19-D.

(3) Stipulation between the defendants and the State of Washington relating to Plaintiff's exhibits 1, 5, 6, 24, 29, 30 and 31 and Defendants' exhibits 14, 15, 16, 17, 18, 19-A, 19-B, 19-C and 19-D. [295]

(4) Order based on the two foregoing stipulations.

(5) Stipulation that original exhibits be retained in the custody of the Clerk of the above entitled court at Portland, for use of the parties in the preparation of their briefs, etc.

(6) Order based on said stipulation.

(7) This Supplemental Praecipe.

Dated November 21st, 1935.

CLARK & CLARK and

M. H. CLARK,

JAY BOWERMAN,

Solicitors for Defendants-Appellants. [296]

District of Oregon,
State of Oregon,
County of Multnomah.—ss.

Due service of the within Supplemental Praecipe for transcript is hereby accepted in Multnomah County, Oregon, this 21 day of November, 1935, by receiving a copy thereof, duly certified to as such by M. H. Clark, of Solicitors for Defendants-Appellants.

EDWIN D. HICKS,

Of Solicitors for Plaintiff-Respondent.

District of Oregon,
State of Oregon,
County of Multnomah.—ss.

Due and timely service of the attached defendants' and appellants' supplemental praecipe for transcript of record, by receipt of a true copy thereof, certified to be such by M. H. Clark, one of attorneys for defendants-appellants, is hereby acknowl-

edged at Portland, Oregon, this 21st day of November, 1935.

I. H. VAN WINKLE,
Attorney General of the State of Oregon.

RALPH E. MOODY,
Assistant Attorney General of the State
of Oregon,

Attorneys for the State of Oregon.

Due and timely service of the attached Defendants' Supplemental praecipe for transcript of record by receipt of a true copy thereof, acknowledged this 21st day of November, 1935.

G. W. HAMILTON,
Attorney General of the State of Washington.

R. G. SHARPE,
Assistant Attorney General of the State
of Washington.

Attorneys for the State of Washington.

[Endorsed]: Filed November 22, 1935. [297]

United States of America,
District of Oregon.—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 4 to 297, inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause then pending therein, numbered in said court E-9471, in which the United States of America is plaintiff and appellee, The Columbia River Packers' Association, a corporation, Baker's Bay Fish Company, a corporation, and H. J. Barbey, are defendants and appellants, The State of Washington, is petitioner and appellee, and The State of Oregon is petitioner and appellee; that the said transcript has been prepared by me in accordance with the praecipe and supplement praecipe for transcript filed by said appellants, that the same has been by me compared with the original thereof, and is a full, true and complete transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe and supplement praecipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is \$47.75, and that the same has been paid by the said appellants.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 27th day of November, 1935.

[Seal]

G. H. MARSH, Clerk. [298]

[Endorsed]: No. 8055. United States Circuit Court of Appeals for the Ninth Circuit. Columbia River Packers Association, a corporation, Baker's Bay Fish Company, a corporation, and H. J. Barbey, Appellants, vs. The United States of America, The State of Oregon, and The State of Washington, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed November 29, 1935.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.